

1 DeRolph v. Ohio.

2 DOUGLAS, J., concurring. I concur in the courageous and well-
3 reasoned decision of the majority. Specifically, I agree that the statutory
4 scheme for funding public elementary and secondary education in Ohio clearly
5 violates Section 2, Article VI of the Ohio Constitution. I write separately only
6 for the purposes of offering some additional explanation why Ohio's statutory
7 scheme violates this provision, to express my view that public education in
8 Ohio is a fundamental constitutional right, and to point out that Ohio's
9 statutory scheme for funding public elementary and secondary schools also
10 violates other constitutional provisions not addressed in the majority opinion.

11 The time has come to end the fact that, in too many cases, the quality of a
12 child's education in Ohio is dependent on the vicissitudes of geography — that
13 is, the place of the child's birth or residence. After an exhaustive review of the
14 record, I am also convinced that it is time for the General Assembly to set
15 education standards and to require performance of the education establishment,
16 with rewards when they meet the standards or severe corrective action when

1 they do not. This should include mandates for cost cutting (additional money is
2 not the only answer) and cost containment with clear accountability.

3 To do this and be fair, however, each district must be given school
4 structures that are safe and conducive to learning, including the necessary
5 fixtures, equipment and supplies that ensure thorough and efficient opportunity
6 to learn. In addition, each district must be placed on a financial footing that
7 permits the district to compete so as to meet the prescribed standards. That is
8 not only a mandate of equity. It is what our Constitution requires.

9 By today's decision, a majority of this court has given the General
10 Assembly the opportunity to revamp the entire education system in this state
11 just as a number of other legislative bodies in our sister states have done in
12 recent years.¹ If all of this requires additional revenue, as it almost certainly
13 does, then that is the price we must pay to enforce, protect and preserve
14 constitutional rights. I would only caution those who would castigate us (as
15 some did the trial judge) for their own purposes to remember what Abraham

1 Lincoln said in his First Inaugural Address, March 4, 1861, in discussing the
2 obligations of the United States Supreme Court and its decisions:

3 “It is a duty from which they may not shrink to decide cases properly
4 brought before them, and it is no fault of theirs if others seek to turn their
5 decisions to political purposes.” Lott, *The Presidents Speak; The Inaugural*
6 *Addresses of the American Presidents, from Washington to Clinton* (1994) 143.

7 I

8 Jurisdiction and Judicial Review

9 This appeal presents a number of issues for this court’s consideration. Is
10 the right to a free public education a fundamental right guaranteed by the Ohio
11 Constitution? Does the system of funding public elementary and secondary
12 schools in Ohio violate the Equal Protection Clause of Section 2, Article I of
13 the Ohio Constitution? Does the system of funding public elementary and
14 secondary schools in Ohio violate Section 2, Article VI of the Ohio
15 Constitution, requiring a thorough and efficient system of common schools
16 throughout the state? Does *Cincinnati City School Dist. Bd. of Edn. v. Walter*

1 (1979), 58 Ohio St.2d 368, 12 O.O.3d 327, 390 N.E.2d 813, control the
2 disposition of the case at bar? Resolution of these issues requires, among other
3 things, a detailed understanding of Ohio’s system of school funding. Equally
4 important to a resolution of these issues are an understanding of the historical
5 development of Ohio’s school funding laws and an earnest appreciation of the
6 significance that the founders of our state and nation placed on public
7 education. However, before addressing these various matters, I find it
8 necessary to briefly comment on this court’s jurisdiction to entertain the
9 present appeal.

10 The court of appeals’ majority held that the courts are not the proper
11 place to challenge the constitutionality of Ohio’s statutory scheme for school
12 funding. Despite overwhelming evidence that the state has utterly failed to
13 establish a system of school funding that is thorough and efficient, the court of
14 appeals’ lead opinion stated that “[i]f changes are needed in the manner in
15 which schools receive funding, this matter is properly within the discretion of
16 the legislative branch of the government, not the judicial branch.” Judge

1 Reader reiterated these sentiments in his concurring opinion. However, I
2 respectfully disagree with that view. Rather, I believe that Judge Gwin of the
3 court of appeals was absolutely correct that the constitutionality of Ohio's
4 statutory framework for school funding is unquestionably a matter for the
5 courts to decide. To hold otherwise would be to ignore the fundamental
6 concept of judicial review established nearly two hundred years ago in
7 *Marbury v. Madison* (1803), 5 U.S. 137, 177-178, 2 L.Ed. 60, 73-74. *Marbury*
8 established, beyond cavil, the inherent powers of the judicial branch of
9 government to review the constitutionality of the acts of the other branches of
10 government.

11 In *Walter*, 58 Ohio St.2d 368, 12 O.O.3d 327, 390 N.E.2d 813, this court
12 entertained certain constitutional challenges to a statutory system for school
13 funding that has since been repealed and replaced with the current statutory
14 framework for funding public elementary and secondary education. However,
15 the following observations in *Walter* concerning the power of the judiciary are
16 as applicable today as they were at the time *Walter* was decided:

1 “We wish to state clearly at the outset that this court has the authority,
2 and indeed the duty, to review legislation to determine its constitutionality
3 under the Constitution of Ohio and to declare statutes inoperative. The
4 doctrine of judicial review articulated by Chief Justice John Marshall in the
5 landmark case of *Marbury v. Madison* (1803), 5 U.S. (1 Cranch) 137,
6 establishes the judicial branch as the final arbiter in interpreting the
7 Constitution.

8 “The doctrine of judicial review is so well established that it is beyond
9 cavil. Consider this court’s opinion in *State v. Masterson* (1962), 173 Ohio St.
10 402 [20 O.O.2d 36, 38, 183 N.E.2d 376, 379], which states, at page 405, in
11 part:

12 ““It has long been an established principle of law that courts do not
13 interfere in political or legislative matters except in those instances where
14 legislative enactments violate the basic law. In those instances where
15 enactments violate the basic law, it was determined early in our judicial history

1 that the courts have not only the power but the duty to declare such enactments
2 invalid.

3 ““One of the basic functions of the courts under our system of separation
4 of powers is to compel the other branches of government to conform to the
5 basic law.’

6 “* * *

7 “We find that the issue concerning legislation passed by the General
8 Assembly pursuant to Section 2 of Article VI of the Ohio Constitution [the
9 Thorough and Efficient Clause] presents a justiciable controversy. * * *”
10 *Walter*, 58 Ohio St.2d at 383-384, 12 O.O.3d at 336, 390 N.E.2d at 823-824.

11 *Walter* makes it abundantly clear that constitutional challenges to the
12 statutory system for funding public education are a matter for the courts to
13 decide. Obviously, this court is not at liberty to shirk that responsibility, and
14 we cannot simply send plaintiffs-appellants to the General Assembly to seek
15 redress of their grievances. Judge Reader stated in his concurring opinion in
16 the court of appeals: “The tax payers of this state should rise up in righteous

1 indignation and tell all the parties in this case to take their truckloads of paper
2 and solutions if any, to where it would do the most good -- the General
3 Assembly of the State of Ohio.” However, this case involves a constitutional
4 attack on Ohio’s system of funding public schools. The General Assembly is
5 not the appropriate place to raise such a constitutional challenge.

6 I completely agree with the majority’s astute observations concerning the
7 jurisdiction of this court to resolve this case. Specifically, I join the majority in
8 utterly rejecting any suggestion that this case and the constitutional issues
9 involved herein should be left for the legislature to decide. In my view, fifteen
10 of the most compelling words spoken at the one-and-one-half-hour oral
11 argument of this case were spoken by plaintiffs’ counsel: “We’re not asking
12 you to do their job, we’re asking you to do your job.” Accordingly, we have
13 proceeded not with any glee but, rather, pursuant to our constitutional duty.

14 The cause is properly before this court for review and final determination
15 pursuant to the judicial powers vested in this court pursuant to the Ohio
16 Constitution.

1 II

2 Ohio's System of Public School Funding

3 The focus of this case is R.C. Chapter 3317, the School Foundation
4 Program for the allocation of state basic aid. In *Walter*, 58 Ohio St.2d at 378,
5 12 O.O.3d at 333, 390 N.E.2d at 820, this court recognized that “[t]he history
6 of educational funding in Ohio * * * has been an accommodation between two
7 competing interests -- the interest in local control of educational programs and
8 the means to fund them and the interest of the state in insuring that all children
9 receive an adequate education.” In *Walter*, we outlined some of the history of
10 Ohio school funding, and a review of that history is pertinent to the discussion
11 herein.

12 In 1821, the Ohio General Assembly enacted a bill making the property
13 in the townships subject to school taxes. See 19 Ohio Laws 51, 55. This
14 legislation was largely ineffective because the levying and collection of taxes
15 were at the option of the local district. In 1825, the General Assembly enacted
16 legislation directing county commissioners to levy a real property tax of one-

1 half mill to support local public schools. 23 Ohio Laws 36, 37. At that time in
2 history, the property tax was the primary means of support for the local public
3 schools. See *Walter*, 58 Ohio St.2d at 378, 12 O.O.3d at 333, 390 N.E.2d at
4 820. In 1906, Ohio undertook a program calling for a large measure of state
5 financial participation to begin assisting financially weak school districts for
6 the purpose of providing those districts with some minimum support for
7 education. *Id.* In 1935, the General Assembly enacted the first Foundation
8 Program, providing substantial financial aid to school districts based on
9 average daily attendance plus additional aid for poorer districts. *Id.* at 378, 12
10 O.O.3d at 333, 390 N.E.2d at 820-821. The amount of state aid was
11 continually increased over the next twenty-one years. *Id.* at 379, 12 O.O.3d at
12 333, 390 N.E.2d at 821. However, despite the increases in the total amount of
13 state aid, the percentage of state support dropped considerably in relation to the
14 local school districts' total operating costs. *Id.* In 1956, the format of state aid
15 was changed to provide state support based on "teacher-units" rather than
16 average daily membership. *Id.* By the 1965-1966 school year, the state was

1 providing approximately one-third of the total operating costs of the local
2 school districts, with local property tax furnishing the remainder. *Id.*

3 In fiscal year 1975-1976, the General Assembly enacted the “Equal
4 Yield Formula” for computing state aid. 136 Ohio Laws 475. See *Walter*, at
5 379, 12 O.O.3d at 334, 390 N.E.2d at 821. This formula was intended to
6 provide an equal sum of combined state and local funds on a per-pupil-per-mill
7 basis for each qualifying school district. *Id.*; former R.C. 3317.022, 136 Ohio
8 Laws, Part I, 492. A qualifying school district was one that levied twenty mills
9 for current operating expenses. Former R.C. 3317.01, 136 Ohio Laws, Part I,
10 487. The formula provided a two-tiered system. That is, every school district
11 received an amount per pupil per mill for the first twenty mills and additional
12 amounts were given to each school district with millage above twenty mills up
13 to thirty mills. *Walter* at 370-371, 12 O.O.3d at 328-329, 390 N.E.2d at 816.
14 In *Walter*, this court reviewed the constitutionality of the Equal Yield Formula
15 for school funding and, in 1979, upheld that formula as constitutionally
16 acceptable. There is a body of thought that the General Assembly created the

1 Equal Yield Formula in anticipation of the filing of the *Walter* case. After
2 *Walter* was decided, the General Assembly, in 1981, abandoned the Equal
3 Yield Formula, former R.C. 3317.022. See Am.Sub.H.B. No. 694, 139 Ohio
4 Laws, Part II, 3460, 3684. At that time, the Equal Yield Formula was replaced
5 by the School Foundation Program, which remains in use today.

6 A

7 The School Foundation Program

8 Ohio's School Foundation Program can be found in R.C. 3317.01 *et seq.*
9 The School Foundation Program for the allocation of state basic aid has
10 operated in a similar manner since 1981. Under the School Foundation
11 Program, state basic aid is available for school districts which, among other
12 things, levy at least twenty mills of local property tax revenue for current
13 operating expenses. R.C. 3317.01(A). State basic aid for qualifying school
14 districts is calculated pursuant to a foundation formula set forth by law. The
15 version of R.C. 3317.022 that was in effect at the time this case was filed
16 (Am.Sub.H.B. No. 298, 144 Ohio Laws, Part III, 3987, 4122) provided the

1 following calculation for the computation and distribution of state aid to
2 qualifying school districts:

3 (school district equalization factor X the formula amount X ADM)

4 - (.02 X total taxable value).

5 The basic state aid calculation remains essentially the same in the current
6 version of R.C. 3317.022. Through this formula, the School Foundation
7 Program guarantees a minimum level of combined state and local per pupil
8 funding.

9 *The Formula Amount*

10 The “formula amount” in the calculation represents a figure set by the
11 General Assembly as part of the biennial budget process. In January 1992, at
12 the time the amended complaint was filed, the formula amount equaled \$2,817.
13 See Am.Sub.H.B. No. 298, 144 Ohio Laws, Part III, 3987, 4122. The formula
14 amount is currently set at \$3,500 pursuant to R.C. 3317.022. The trial court
15 found (and the evidence supports the finding) that the formula amount is
16 determined by the General Assembly based solely on how much money is left

1 in the budget after all other legal entitlements are funded. In other words, the
2 amount appropriated for education represents a “budgetary residual” that has
3 nothing to do with the true costs of educating a student. Oliver Ocasek,
4 President of the State Board of Education at the time of trial, testified that the
5 State Board of Education believed that a formula amount of \$4,000 per pupil
6 was necessary to even approach an adequate level of funding for Ohio’s school
7 districts. It should be noted, however, that Ocasek personally believed that the
8 true egregious impact of the School Foundation Program was that it did not
9 even come close to providing equalization, given the flat distributions in areas
10 of categorical funding, etc., explained *infra*.

11 *The Cost-Of-Doing-Business Factors*

12 Under the state basic aid calculation, the formula amount (\$2,817 in
13 school year 1992-1993) is adjusted by a school district equalization factor or
14 cost-of-doing-business factor. R.C. 3317.022(E). The applicable rates of
15 adjustment for the 1992-1993 school year were contained in former R.C.
16 3317.02(E). 144 Ohio Laws, Part III, 3987, 4118-4120. The rates are similar

1 in the current version of R.C. 3317.02(E). These rates of adjustment vary from
2 county to county and apply equally to all districts within the county. The cost-
3 of-doing-business factors assume that costs are lower in rural districts than in
4 urban districts but, as the trial court correctly concluded, that assumption is not
5 always true.

6 *The “Charge-Off”*

7 “ADM” stands for average daily membership, which is calculated
8 pursuant to R.C. 3317.03. See R.C. 3317.02(A). By multiplying the formula
9 amount, the cost-of-doing-business factor, and the ADM, the foundation
10 formula establishes a minimum amount of combined local and state per pupil
11 aid per district. A “charge off” is then subtracted from that figure. The charge-
12 off is the total taxable value of real and tangible personal property in the
13 district times a certain percentage. See R.C. 3317.022(A) (computation for
14 state aid) and 3317.02(D) (defining “total taxable value” as the sum of the
15 amounts certified by the Tax Commissioner under R.C. 3317.021[A][1] and
16 [2]). At the time this case was filed, total assessed value was multiplied by .02

1 (i.e., twenty mills times total assessed valuation) to produce the applicable
2 charge-off. 144 Ohio Laws, Part III, 3987, 4122. During the pendency of the
3 litigation, the twenty-mill multiplier was increased to 20.5 mills (Am.Sub.H.B.
4 No. 152, Section 36.12, 145 Ohio Laws, Part III, 4432-4433) and was raised
5 thereafter. Currently, total taxable value is multiplied by .023 for purposes of
6 calculating the charge-off. R.C. 3317.022. Subtracting the applicable charge-
7 off results in a figure constituting the amount for basic state aid for the district
8 in question.

9 *Disadvantaged Pupil Impact Aid and Categorical Programs*

10 In addition to the formula amount, school districts with children whose
11 families collect Aid to Dependent Children (“ADC”) receive what is called
12 “Disadvantaged Pupil Impact Aid” or “DPIA.” Am.Sub.H.B. No. 298, Section
13 59.02, 144 Ohio Laws, Part III, 4556-4557. This funding is calculated pursuant
14 to R.C. 3317.023 and consists of flat distributions (distributions that are not
15 equalized) based on ADM. Pursuant to R.C. 3317.022 and 3317.023, the aid to
16 be provided to a local district comprises the amount the district is entitled to

1 receive under the foundation formula plus the amount of DPIA. The state also
2 provides appropriations to school districts for categorical programming such as
3 vocational and special education. R.C. 3317.024. There is essentially no
4 equalization for funding of categorical programs, so that districts receive
5 categorical aid without regard to school district wealth. According to the
6 testimony of Oliver Ocasek, the President of the State Board of Education at
7 the time of trial, the flat distributions for categorical aid represent a major flaw
8 in the system of school funding and reduce the equalization effect of the
9 foundation formula. Ocasek testified that the “main categoricals,” such as
10 special education, vocational education, and DPIA, have “never been fully
11 funded.” Rather, funding for those categories is accomplished by essentially
12 siphoning funds that would otherwise be available for distribution under the
13 foundation formula. In the words of Mr. Ocasek: “[A]s you take a pot of
14 money and you deduct from that these fine categorical programs and for
15 [DPIA], you, therefore, are siphoning away from the total pot of funds, which I
16 think are basic, and the more categorical money we give, the less equalization

1 money we have. That simple. I don't think you need to be a professor of
2 school finance to say that.”

3 *Guarantee Provisions*

4 The School Foundation Program contains certain guarantee provisions to
5 ensure that a school district receives the greater of the program amount or the
6 guarantee amount. See R.C. 3317.04 and 3317.0212. Thus, some districts
7 receive guarantee payments from the state under the School Foundation
8 Program rather than payments calculated pursuant to the foundation formula
9 described above. Oliver Ocasek testified that the guarantee provisions
10 disproportionately benefit the wealthier districts, compromise the equalization
11 effect of the School Foundation Program, and represent a major defect in
12 Ohio's system of school funding.

13 *Am.Sub.H.B. No. 920 and Tax Reductions*

14 School districts are required to levy twenty mills for current operating
15 expenses in order to participate in the School Foundation Program. See R.C.
16 3317.01(A). The twenty mills comprise both “inside” and “outside” mills.

1 Inside mills are levied without approval of the electorate. Unvoted property
2 taxes are limited to ten mills, with the ten mills spread among the various
3 taxing units. See Section 2, Article XII of the Ohio Constitution and R.C.
4 5705.02. An average local school district in Ohio manages to raise revenue
5 from approximately 4.6 of the ten available inside mills. Theoretically, a
6 school district can raise an unlimited amount of outside millage, with the only
7 limitation being that outside millage must be approved by the electorate. R.C.
8 5705.07.

9 For property tax purposes, real property in Ohio is divided into two
10 classifications: Class I property, consisting of residential and agricultural
11 property, and Class II property, consisting of all other real property, including
12 commercial, industrial, public utility and mineral. See R.C. 5713.041; Section
13 2a, Article XII, Ohio Constitution.

14 Complicating the system of school funding in Ohio is the effect of
15 certain tax reduction factors originally introduced into law with the General
16 Assembly's enactment of Am.Sub.H.B. No. 920 (136 Ohio Laws, Part II, 3182,

1 3194). H.B. 920 was enacted by the General Assembly as a tax reduction
2 measure. The provisions of law enacted by the General Assembly in H.B. 920
3 have themselves been amended on several occasions since 1976. A product of
4 these various amendments is the current version of R.C. 319.301, which is very
5 similar to the version of that statute in existence at the time this case was
6 commenced.

7 As pointed out by the majority, the purpose of R.C. 319.301 (like the
8 predecessor versions of that statute, including the version of R.C. 319.301
9 introduced into law by H.B. 920) is to limit the effect of inflation in property
10 values on growth of real property tax revenues. These R.C. 319.301 tax
11 reduction factors are applied when property values increase due to reappraisal
12 or update. Pursuant to R.C. 319.301(A)(2), inside millage is not subject to tax
13 reduction factors. Additionally, R.C. 319.301 provides that tax reduction
14 factors do not apply to new construction growth or tangible personal property.
15 The effect of R.C. 319.301 is that a school district will receive the same
16 revenue from voted tax levies after reappraisal as it did before reappraisal,

1 notwithstanding that real property valuation in the district has increased
2 through inflation since the time of the initial tax levy. Thus, revenue derived
3 from effective outside mills essentially remains frozen in time -- it does not
4 increase through the life of the levy. As a direct result of the tax reduction
5 measures first introduced by H.B. 920, local revenues cannot keep pace with
6 inflation. To keep abreast of costs, many school districts have been required to
7 propose additional tax levies. However, most of these additional tax levies
8 have failed.

9 Since R.C. 319.301 tax reduction factors do not apply to new
10 construction growth, see R.C. 319.301(B)(2)(a), (b) and (D)(1), school districts
11 with new construction growth enjoy additional revenue from an increase in
12 valuation, while districts with growth attributable solely to inflation do not.
13 Moreover, R.C. 319.301 sets a floor of effective tax rate reductions at twenty
14 mills for each class of real property. School districts that have reached the
15 twenty-mill floor of reductions do not have their effective rates reduced further.
16 R.C. 319.301(A)(2). Consequently, even if all other things are considered

1 equal, school districts with increases in real property valuation receive
2 differing amounts of local tax levy revenue depending on whether the district
3 has reached the twenty-mill floor.

4 Suffice it to say that the effects of tax reduction factors are complicated,
5 including the effects of “phantom revenue” discussed in the majority opinion.
6 The effects are varied and uneven among Ohio’s school districts, depending on
7 the amount of real versus tangible personal property, the amount of inside mills
8 a district has, the existence and extent of new construction growth, whether the
9 district is at or close to the twenty-mill floor in either class of real property, and
10 the extent of increases in real property valuation.

11 *School District Borrowing*

12 To supplement their budgets, school districts have been forced at an
13 increasing and alarming rate to borrow heavily against future expected revenue
14 receipts. Under the so-called spending reserve loan program, school districts
15 are permitted to borrow against a subsequent year’s revenue with approval of

1 the Superintendent of Public Instruction. See R.C. 133.301. There is a
2 statutory maximum amount that can be borrowed by a school district under the
3 spending reserve program, but the Superintendent of Public Instruction may
4 permit excess borrowing. *Id.* Obviously, where a school district borrows
5 against a subsequent year's tax receipts, the district takes away resources for
6 operations for the next fiscal year. Thus, as the trial court found, "[a] school
7 district can get into a spiral where it is continually borrowing and paying back
8 the following year. A school district, therefore, is always taking away from the
9 future. Any time a school district does such borrowing into the future, it robs
10 future generations of children." For some school districts, borrowing has
11 become a way of life, leading to the proverbial spiral of debt.

12 School districts may also borrow from commercial lenders pursuant to
13 R.C. 3313.483 *et seq.*, the emergency school assistance loan program.
14 However, school districts are required to borrow under the spending reserve
15 loan program as a condition precedent to participating in the emergency school
16 assistance loan program. See R.C. 3313.483(B). Pursuant to R.C.

1 3313.483(A), school districts may determine by resolution that they are unable
2 to remain open for instruction on all days set forth in the adopted school
3 calendar and are unable to pay their expenses. Such a determination may also
4 be made by the Superintendent of Public Instruction pursuant to R.C. 3313.489.
5 In either event, the auditor of state² must determine whether such a condition
6 exists. If the auditor finds that the board of education has attempted to avail
7 itself of all revenue sources available, the auditor must certify that finding to
8 the Superintendent of Public Instruction and the State Board of Education and
9 must also certify the amount of operating deficit the district will have at the end
10 of the fiscal year. R.C. 3313.483(B). A school district that has been certified
11 as having a projected operating deficit must apply for an ordinary commercial
12 loan from a commercial lender or underwriter. R.C. 3313.483(D). If the
13 application is rejected, the school district must submit to the Superintendent of
14 Public Instruction a plan for reducing the district's budget and must then apply
15 for a loan from a commercial bank, underwriter or other prospective lender.
16 R.C. 3313.483(E)(1). The superintendent is required to review each budget

1 reduction plan. The plan must include a repayment schedule in amounts
2 sufficient to permit repayment of the principal amount of the emergency
3 assistance loan, but apparently does not require reductions sufficient in amount
4 to pay the interest on the emergency loan or to repay the principal and interest
5 on any spending reserve loan. Thus, as the trial court found, for most school
6 districts with outstanding emergency assistance loans, subsequent borrowing
7 under the spending reserve loan program will be required.

8 The superintendent routinely recommends controlling board approval of
9 an emergency school assistance loan for a school district that has completed the
10 application process and has a certified projected shortfall of operating revenue.
11 If a school district receives controlling board approval, the district may obtain
12 the loan from a commercial lending institution. See R.C. 3313.483(E).
13 Pursuant to R.C. 3313.483(E)(3), the loan is repaid by diverting funds
14 otherwise available to the school district under the School Foundation Program
15 to the commercial lender for repayment of the loan. R.C. 3313.483(E)(3) also
16 provides that “[n]o note or other obligation of the board of education under the

1 loan constitutes an obligation nor a debt or a pledge of the faith, credit, or
2 taxing power of the state, and the holder or owner of such note or obligation
3 has no right to have taxes levied by the general assembly for the payment of
4 such note or obligation, and such note or obligation shall contain a statement to
5 that effect.”

6 Effective December 22, 1992, if a district receives an R.C. 3313.483
7 emergency loan of more than seven percent of the district’s general fund
8 expenditures and has already received an emergency loan under R.C. 3313.483
9 within the last five years, the district is subject to state supervision. See R.C.
10 3313.488 and 3313.4810. The State Board of Education may also subject a
11 district to state supervision pursuant to R.C. 3313.487. School districts subject
12 to state supervision are prohibited from making any expenditure of money, any
13 employment, purchase or rental contract, giving any order involving the
14 expenditure of money, or increasing any wage or salary schedule without
15 written approval of the Superintendent of Public Instruction. R.C. 3313.488.
16 The so-called receivership school districts (certain heavily indebted districts

1 that have been subjected to the provisions of R.C. 3313.488) include school
2 districts from large urban areas in Ohio as well as property-poor rural school
3 districts. Twenty-five school districts were receivership districts as of
4 December 23, 1992.

5 *Public School Buildings*

6 The School Foundation Program contains no express provision for the
7 construction and maintenance of Ohio's public school facilities. Rather, the
8 construction of public elementary and secondary schools in Ohio is primarily
9 financed through the issuance and sale of school district bonds upon approval
10 of the electors in the district. The bonds are repaid with the proceeds of
11 property taxes levied on the taxable property of the school district for that
12 purpose. With stated exceptions, districts are limited by law to a maximum
13 bonded indebtedness of nine percent of the district's total property valuation.
14 See R.C. 133.06(B). This amount is exclusive of, among other things, any
15 emergency school assistance loan. R.C. 133.06(D)(4). However, "special
16 needs" districts may apply to the Superintendent of Public Instruction for

1 permission to exceed the nine-percent limitation. R.C. 133.06(E). A district
2 may qualify as a special-needs district if the superintendent finds that (1) the
3 district does not have sufficient additional funds from state or federal sources
4 to meet projected needs, and (2) the projection of the district's potential
5 average growth of tax valuation during the next five years indicates a
6 likelihood of potential average growth of at least three percent per year. *Id.*

7 R.C. Chapter 3318, the Classroom Facilities Act, is essentially a loan
8 program for the construction of public school facilities. Specifically, R.C.
9 Chapter 3318 provides a means by which qualifying school districts may
10 "purchase" classroom facilities from the state. See R.C. 3318.02. The process
11 of obtaining state assistance under the Classroom Facilities Act for
12 construction of public school facilities is extremely complicated. However, in
13 general terms, this assistance is contingent on, among other things, the
14 existence of adequate state funds, the approval of a school district's proposed
15 project, the passage of a proposition by the electors in the district authorizing
16 the district to issue bonds in an amount sufficient to bring the district to a

1 required level of net indebtedness and authorizing a local tax levy for the
2 purpose of paying the cost of the purchase from the state, and the execution of
3 a written agreement between the State Board of Education and the local school
4 district. See R.C. 3318.01 through 3318.08. Based upon the evidence at trial
5 and the stipulations of the parties, the trial court made the following relevant
6 findings of fact concerning the Classroom Facilities Act:

7 “In order to participate in Classroom Facilities Act funds, a district must
8 be included on a ‘list’ of eligible districts. Lists are only created at such time
9 as funds are available. After reviewing the applicants, the Department of
10 Education conducts a statewide survey to determine those districts most in need
11 of additional facilities.

12 “Approval for participation for Classroom Facilities Act funding
13 involves an inspection by the Ohio Department of Education officials and a
14 determination of the number and percent of inadequately-housed pupils, as well
15 as a prioritization of school district applicants based on the percentage of
16 inadequately-housed pupils that need to be housed with state money.

1 “From 1976 to the present time, there have been three lists of districts
2 eligible for Classroom Facilities Act funding; the initial list was prepared prior
3 to 1976 when Dr. Phillis became Assistant Superintendent of Public
4 Instruction. A second list was prepared in 1984 and a subsequent list in 1989.
5 The 1989 list was revised with one additional district being included in 1991.

6 “Plaintiffs’ Exhibit 378 is a list of the 44 school districts who have been
7 approved for classroom facilities assistance pursuant to the provisions of
8 Chapter 3318 of the Ohio Revised Code. The list was adopted by the State
9 Board of Education on December 20, 1989, and updated in 1991. The list
10 describes a total of over \$114,000,000 [*sic*, \$414,000,000 according to the
11 exhibit and the stipulations of the parties] in value of approved facilities needs.
12 Of these school districts, 18 have been approved for school building assistance,
13 passed the requisite levies, and funds have been made available for school
14 construction. Twenty-six (26) school districts remain on the approved building
15 list, for which no funds have been appropriated by the Ohio General Assembly.

1 “All the pupils identified as ‘improperly housed’ in 1989 in districts that
2 have not received Classroom Facilities Act assistance continue to be
3 improperly housed unless the school district has provided facilities without
4 state assistance.

5 “* * *

6 “Because any school district beyond [those listed in Plaintiffs’ Exhibit
7 378] [is] at least seven to nine years down the road before help will be
8 available to them (assuming a level of appropriations by the General
9 Assembly), the Division of School Building Assistance of the Ohio Department
10 of Education accepts letters of intent from school districts, indicating their
11 interest [in being] placed upon the approved school building assistance list.
12 Stipulation Exhibit 52 lists those 50 school districts who have filed letters of
13 intent with the building assistance office, including Plaintiff Northern Local
14 School District.

1 “It is the intent of the State Board of Education to take care of all 44
2 districts set forth on the approved building assistance list, Plaintiffs’ Exhibit
3 378, before the State moves on to any more districts. These districts must pass
4 levies and their projects must be completed before any new schools will make
5 it on to the approved buildings list.

6 “Classroom Facilities Act funds do not include funds for the equipment
7 or operation of schools, but are limited to provision of school facilities only.
8 [See R.C. 3318.01(B).]

9 “The state has final approval in the design of facilities funded with
10 Classroom Facilities Act funds. [R.C. 3318.091.]” (Citations to evidence
11 omitted.)

12 The parties have stipulated that as of July 1993, only \$2,006,176.83 was
13 available from the state to fund approved classroom facilities projects, not
14 including, among other things, fiscal year 1994 and 1995 budgeted
15 appropriations. In 1990, the Ohio Department of Education conducted a

1 comprehensive survey of Ohio's public school facilities. The survey identified
2 approximately *\$10.2 billion* in needs for repairs and improvements for Ohio's
3 public school facilities. The trial court reviewed the Classroom Facilities Act
4 (R.C. Chapter 3318) and found the program to be seriously underfunded. A
5 review of the record can lead to no other conclusion.

6 *The 1990 Ohio Public Schools Facilities Survey*

7 In 1989 and 1990, the Ohio Department of Education, at the direction of
8 the General Assembly, conducted a statewide survey of Ohio's public school
9 buildings. The survey cost approximately \$3.5 million and involved an on-site
10 review of each public school building in the state that housed pupils. The
11 Facilities Survey was conducted by architects. There is no dispute that the
12 survey represents a fair and accurate report of the conditions of Ohio's schools
13 as of 1990. The results of the survey were published and submitted to the
14 General Assembly. The survey is contained in the record as Plaintiffs' Exhibit
15 14 and identified \$10.2 billion in needed improvements for Ohio's public
16 elementary and secondary school facilities.

1 The Facilities Survey identified the need for over \$153 million to make
2 public school buildings accessible to the handicapped. However, the evidence
3 demonstrates that given the requirements of the Americans with Disabilities
4 Act (“ADA”), Section 12101 *et seq.*, Title 42, U.S.Code, the \$153 million in
5 needs identified by the survey represents a substantial underestimation of the
6 true costs involved in complying with applicable federal mandates. The survey
7 determined that only about twenty percent of existing public school buildings
8 in Ohio are satisfactory in terms of accessibility to the handicapped. The state
9 of Ohio provided grants for architectural barrier abatement in fiscal year 1990
10 and 1991. Between that time and the time of trial, the General Assembly had
11 provided no additional appropriations for barrier abatement in public schools.
12 The amounts appropriated in 1990-1991 totaled \$3.38 million. School districts
13 were permitted to apply for a maximum of three grants for architectural barrier
14 abatement. The grants were doled out on a first-come, first-served basis,
15 without regard to the relative wealth of the districts applying for grant money.
16 Seventy-six school districts that applied for grants received none. As of the

1 time of trial, there were no funds available from the state or federal government
2 to help pay for making public school buildings accessible as required by the
3 ADA.

4 The Facilities Survey identified over \$328 million in funds needed for
5 the management of asbestos hazards in public school buildings. Funds are
6 available to public school districts on the federal level for asbestos abatement.

7 See, generally, Section 4011 *et seq.*, Title 20, U.S.Code. However, federal
8 funds are scarce. In this regard, the trial court made the following relevant
9 findings of fact. In 1993, school districts in Ohio submitted \$120 million in
10 requests for funds to abate “Class 1” asbestos hazards to conform to the federal
11 Asbestos Hazard Emergency Response Act, Section 2641 *et seq.*, Title 15,
12 U.S.Code. Only twenty-nine school districts received a total of \$14.7 million
13 in grants and loans for abatement of the Class 1 asbestos hazards. For fiscal
14 year 1990, approximately \$18 million was appropriated by the General
15 Assembly for asbestos abatement in the public schools. The funds were
16 available on a first-come, first-served basis. More than two hundred forty

1 school districts submitted applications totaling \$140 million in requests for the
2 \$18 million in available funds. Only sixty-three districts received any funding.
3 For fiscal year 1991, thirty-four districts received asbestos abatement grants
4 while more than one hundred fifty-eight districts that had applied for grants
5 received none. Between 1991 and the date of trial, no further state funds were
6 available for asbestos abatement. Aside from the scarce federal funds, no
7 money was available to the districts for asbestos abatement other than local
8 school district revenue.

9 Each of the appellant school districts was determined by the Department
10 of Education to have greater facilities needs than could be paid for by the
11 districts on a local level, even if the districts had no other indebtedness and
12 even if the districts were capable of passing local bond issues to the maximum
13 amount permitted by law. The trial court found that in addition to the appellant
14 school districts, sixty-one percent of the school districts in Ohio are unable to
15 meet the amount of their identified facilities needs.

16

B

1 the joint stipulations of the parties. Some of the trial court's findings and the
2 evidence upon which the findings were based may be summarized as follows.

3 • The formula amount provided through the School Foundation
4 Program does not even come close to the average expenditure per pupil in
5 Ohio, and the average per-pupil expenditure is outpacing the formula amount at
6 an increasing rate. The fact that the formula amount does not reflect the true
7 costs of education represents a substantial weakness in Ohio's system of school
8 funding.

9 • For fiscal years 1994 and 1995, the State Board of Education
10 requested a \$1.9 billion increase in funding. The General Assembly
11 appropriated only \$625 million in additional funds. The amounts requested by
12 the State Board of Education and denied by the General Assembly were
13 considered to be necessary for the education of Ohio's public school students.

14 • Categorical program allocations to school districts through the
15 School Foundation Program are not equalized. Wealthy districts receive the

1 same unit funding as poor districts for, among other things, vocational and
2 special education. Further, the amounts received for categorical programs such
3 as vocational and special education are less than the actual costs of the
4 programs, with poor school districts having less ability to make up the
5 difference between the state funding provided and the actual program costs.

6 • The guarantee provisions of the School Foundation Program
7 diminish the equalization effects of the foundation program. For fiscal year
8 1993, over one-third of all school districts in Ohio received payments under
9 guarantee provisions as opposed to the formula for state basic aid. A majority
10 of the payments under the guarantee provisions go to the wealthier districts.
11 The operation of the guarantee provisions of the School Foundation Program is
12 considered by the State Board of Education to be a fundamental weakness in
13 the way Ohio funds its schools.

14 • The formula for determining Disadvantaged Pupil Impact Aid
15 (“DPIA”) does not accurately reflect the true costs of educating disadvantaged
16 pupils in high concentrations of poverty. There is no predictability to the DPIA

1 system of funding, and predictability in funding is an important aspect of
2 financial management.

3 • The amount of charge-off in the foundation formula does not
4 accurately measure the ability of school districts to pay their local share of the
5 basic program.

6 • The cost-of-doing-business factors in the foundation formula
7 apply equally to all school districts within a county regardless of the true cost
8 of operations in the individual districts. The factors assume that costs are
9 lower in rural districts as opposed to urban districts, but many costs associated
10 with running a school district are not affected by the district's location in the
11 state. Additionally, the cost-of-doing-business factors do not fully reflect
12 differences in costs associated with school district operations and do not
13 adequately account for differences in costs within counties.

14 • The tax reduction factors of R.C. 319.301 severely limit growth of
15 local property tax revenues. Consequently, school districts must repeatedly

1 propose local tax levies to raise necessary funds. These increased numbers of
2 proposals have met with increasing failure.

3 • R.C. 319.301 and the effects of phantom revenue in the state aid
4 calculation deprive school districts of necessary funding. Phantom revenue
5 occurs where a school district has inflationary growth in real property
6 valuation, receives no additional local tax receipts commensurate with the
7 increased valuations, and receives less in state basic aid since the increased
8 valuations increase the amount of the district's charge-off.

9 • But for tax reduction factors, a total of more than \$1.176 billion in
10 additional revenues would have been available for Ohio's public schools in
11 1990 alone. As a result of the tax reduction factors, school districts lost over
12 \$1.472 billion in real property tax revenue in fiscal year 1992. In fiscal year
13 1992, tax reduction factors reduced property taxes statewide to the tune of
14 26.12 percent.

1 • Ohio’s system of school funding places so much of the burden for
2 raising required revenues on the backs of the local school districts that it invites
3 disparities among the districts. There is a strong correlation in Ohio between
4 assessed property valuation per pupil and total expenditures per pupil. The top
5 two hundred school districts in Ohio (ranked by assessed value per pupil)
6 spend over \$1,000 more per pupil per year than the bottom two hundred school
7 districts. The result is that there are rich and poor school districts in Ohio.
8 Specifically, there are districts in which per-pupil revenue and expenditure
9 levels far exceed the per-pupil revenue and expenditure levels of other (less
10 fortunate) schools.

11 • The disparities in school district revenues and expenditures are not
12 due to the lack of tax effort of the districts or the voters in the districts. The
13 trial court found that “[f]iscal effort between the top and bottom deciles of
14 assessed valuation per pupil indicates that although there is a revenue and
15 expenditure disparity, the level of effort between the rich and poor is virtually
16 uniform.” The trial court also found that “[t]aking into account both the value

1 of assessed property and the adjusted gross income as combined measures of
2 ability to pay taxes, the poorest 200 school districts in Ohio actually exerted a
3 greater level of tax effort in 1990 than the wealthiest 200 school districts.”

4 • Because one mill of local tax effort raises so little in districts with
5 low assessed valuation, those districts have extreme difficulties in passing
6 effective millage since (1) voters can ill afford to pay the increased tax, and (2)
7 the benefits to the school district are minimal since property valuation is low.
8 The extent of disparities in funds available to Ohio’s school districts grew over
9 the decade of the 1980s and continues to grow.

10 • According to the testimony and the trial court’s findings, Ohio is
11 among the states with the greatest disparities in expenditures per pupil. In
12 1990, Ohio ranked forty-eighth out of the fifty states in the extent of disparity
13 of revenue and expenditure per pupil.

14 • Predictability and reliability of income are extremely important
15 aspects of school finance. However, the system of school funding in Ohio does

1 not provide stability of income to local school districts and adversely affects
2 the ability of the districts to properly manage the operation of the public
3 schools.

4 • The trial court found that one of the driving forces behind the
5 financial disparities in Ohio's system of school finance is the differences in
6 Class II real property valuation among the various districts. The growth in
7 inequity in the distribution of Class II property (property other than
8 residential/agricultural) among the districts grew from 1981 through 1990 at a
9 far greater rate than the growth in inequity in Class I (residential/agricultural)
10 real property.

11 • There is little industry in the Dawson-Bryant School District.
12 Thus, most of the burden of local taxation is placed directly on the backs of the
13 residents of the district. Average income is very low compared to other
14 districts within the state. The residents of the Dawson-Bryant School District
15 have little or no discretionary income with which to pay additional taxes.

1 Twenty-five percent of the district’s students are ADC recipients and a great
2 percentage of the students qualify for free or reduced-price lunch programs.

3 • With respect to the Lima City School District, the trial court found
4 that “[p]eople who move into [this] district tend to be people who are moving
5 to take advantage of low income housing. As a result, the individuals who
6 attend the Lima City Schools tend to be poor.” The trial court further found
7 that “[t]he Lima City School District has not proposed the passage of additional
8 tax levies to its voters because it has one of the lowest tax bases and one of the
9 lowest per capita incomes of any school district in the State of Ohio, such that
10 the tax payers of the District are already assuming a significant burden. * * *

11 Thus, the existing tax burden, combined with an ever increasing population
12 living below the poverty line makes the prospect of passage of an additional tax
13 levy unlikely.”

14 • Northern Local School District has experienced rapid increases in
15 enrollment as a consequence of an increase in the concentration of mobile
16 homes. These homes are taxed at lower rates than permanent structures, and

1 the influx of mobile homes has diminished the district's tax receipts. Given the
2 lower tax rate, an influx of mobile homes generally harms a district by bringing
3 in many new students without adequate corresponding tax revenue. Residents
4 moving into the district tend to be poor and the ability of the district's residents
5 to pay additional taxes has decreased over time.

6 • The economic situation in the Southern Local School District is
7 grim. Jobs are scarce and large coal companies have either reduced or ceased
8 operations in the district. Additionally, the federal government has purchased
9 large tracts of land in the district and does not pay any taxes on the property.

10 • The economy of Youngstown has hurt the Youngstown City
11 School District. The combination of steel mill closings and tax abatements to
12 draw new businesses has had a devastating impact on the future viability of the
13 Youngstown city schools. With respect to this district, the trial court made the
14 following relevant findings:

1 “The Select Committee to Review and Study Ohio’s Education System
2 heard testimony from the Superintendent of the Youngstown City Schools that
3 the Youngstown-Mahoning Valley area lost 40,000 jobs between 1977 and
4 1987, resulting in income loss to employee wage earners and loss of personal
5 tangible property value throughout the area.

6 “The plant closings in Youngstown have made it very difficult for the
7 school system to function. The closings have caused tremendous
8 unemployment, increased numbers of people on ADC, increased numbers of
9 students on free or reduced price lunches, increased numbers of single-parent
10 families, increased latchkey situations, increased numbers of neglected
11 children, and many people are functioning on a survival basis with food,
12 clothing, and shelter needs.

13 “The total value of abated property in the Youngstown City School
14 District grew from \$4,073,310 in [1988] to \$16,928,920 in 1992. Property in
15 the district, exempt from taxation, was valued at \$159,023,950 in 1992.

1 “In the Youngstown City School District, between tax year 1978 and
2 1987, the total assessed property value fell from slightly over \$1 billion to \$606
3 million, measured in 1990 dollars. By the 1990 tax year, total assessed value
4 had fallen to \$547 million.

5 “In Plaintiff Youngstown City School District, 1 mill of taxes raised
6 about \$62 for each student in 1979, \$41 in 1987, and only \$37 in 1990.

7 “The average daily membership (ADM) of the Youngstown City Schools
8 has declined by about 1,866 students from 1982 to 1992. * * *” (Citations to
9 evidence omitted.)

10 • Property-poor school districts and others have been forced to
11 borrow funds to meet their needs. The trend in borrowing has grown, with a
12 growing number of school districts entering into receivership/state supervision.
13 For some school districts, borrowing under the state’s loan programs has
14 become a way of life. The majority of these districts have low property
15 valuation and have been unsuccessful in passing additional tax levy millage on

1 more than one occasion. The magnitude of borrowing under the loan programs
2 has become staggering, and most districts have very little chance of escaping
3 from this vicious circle of mortgaging the future of Ohio's public school
4 students.

5 • As a condition to receiving emergency school assistance loans,
6 school districts must borrow under the spending reserve loan program and must
7 drastically cut expenditures. Cutting expenditures in anticipation of having to
8 borrow funds is common financial practice. Thus, expenditure reduction is
9 common among financially distressed school districts -- even those that have
10 not entered into the emergency school assistance loan program.

11 • School district plans for expenditure reductions submitted with
12 applications for emergency school assistance loans normally include, as the
13 first order of business, cuts in school administrators, classroom teachers and
14 support personnel. The next largest area of expenditure reduction comprises
15 materials, supplies and textbooks. Next are early retirement incentives, delay
16 in the purchase of school buses, and cuts in maintenance costs. However, cuts

1 in textbook purchases and maintenance usually occur long before a district
2 applies for an emergency assistance loan. As a result of the cuts that must be
3 made to receive a loan, educational programs are less effective. Reduction of
4 classroom teachers, textbooks and supplies adversely affects educational
5 opportunity.

6 • At the time the trial court issued its decision in this matter, at least
7 four of the “big eight” city school districts in Ohio had been approved for an
8 emergency school assistance loan. These districts were the Youngstown,
9 Akron, Cleveland and Cincinnati city school districts. The Southern Local
10 School District borrowed money through the emergency assistance loan
11 program in fiscal year 1992 and had instituted many cuts in staff, supplies and
12 materials. These cuts had devastating consequences in the district, including a
13 large number of students not passing on to higher grade levels due, at least in
14 part, to the lack of available staff and the lack of sufficient teaching materials.
15 If Southern Local needs to borrow additional moneys under the emergency
16 assistance loan program, there is very little (if anything) the district could cut

1 from its bare-bones budget for the required expenditure reduction plan. The
2 trial court found that as of the time of trial, appellant Northern Local School
3 District was the only district in Perry County not to receive an emergency
4 school assistance loan. However, while Northern Local was not a loan fund
5 district, it was considered a “borderline” school district.

6 • Budget cuts and lack of funding have deprived the students in the
7 appellant school districts of the educational opportunities available to other
8 public school students in Ohio. The trial court found and the evidence
9 confirms that students in the appellant school districts are not being provided
10 with adequate textbooks, a sufficient number of teachers and support
11 personnel, an acceptable level of guidance counseling and necessary
12 supervision, sufficient laboratory equipment, opportunities for advanced
13 placement, acceptable levels of vocational training, and a host of other
14 resources, items and materials necessary to ensure the students a high quality
15 education.

1 • The appellant school districts have lost or are in the process of
2 losing experienced teachers to districts that are able to pay higher salaries.
3 Property-poor districts, including some of the appellant school districts, have
4 been required to hire less experienced school teachers because they can be paid
5 less. Poorer school districts, including some of the appellant school districts,
6 have had great difficulty hiring necessary personnel. The trial court found that
7 the salary schedule for Dawson-Bryant was inadequate to attract certificated
8 teachers and was not competitive with the pay scales of other districts within
9 the county or the state. Thus, Dawson-Bryant was losing good teachers to
10 neighboring school districts and was in jeopardy of losing more for the same
11 reason. The Lima City School District's average teacher salary was lower than
12 all the other districts of its type in the state. Northern Local has lost teachers
13 and administrators due to a lack of competitive salaries. The district has lost
14 other teachers and support personnel as a result of budgetary reductions.
15 Northern Local cannot hire experienced teachers because of a lack of funding.
16 Rather, the district has been forced to hire inexperienced teachers whose

1 salaries are lower. The average teacher salary for the Southern Local School
2 District is one of the lowest in the state. For average teacher's salary, Southern
3 Local ranks five hundred fifty-seventh in the state. The district has trouble
4 recruiting teachers in certain specialized areas. The Youngstown City School
5 District generally hires inexperienced teachers due to budgetary constraints.
6 The district's salary schedule is not adequate to draw needed teachers and
7 teachers with certain training into the community. Staff development and in-
8 service teacher training for the appellant school districts and others have been
9 woefully inadequate.

10 • The curricula in the appellant school districts are severely limited.
11 For example, at the Dawson-Bryant High School, there was only one science
12 lab, which, as of February 1993, was in a general state of disrepair. Dawson-
13 Bryant has been unable to implement model math and language arts curricula
14 due to a lack of necessary resources and materials. Similar problems, to a
15 greater or lesser degree, were being experienced by each of the appellant
16 school districts.

1 • Generally, reductions by a school district in the number of
2 teachers, textbooks, materials and supplies directly affect the educational
3 opportunity available to students. At the time of trial, the appellant school
4 districts were financially unable to purchase required textbooks, and were using
5 texts with missing pages and with ancient copyright dates. For some classes,
6 there were no textbooks at all. There was evidence as to the inadequacies of
7 school libraries. There were serious shortages of materials and supplies
8 throughout the appellant school districts. Lima City, Southern Local, and
9 Youngstown school teachers often spend a good amount of their own money to
10 bring supplies to work. Teachers in the Southern Local School District are
11 issued one or two boxes of paper that must last them the entire school year, and
12 most teachers end up buying paper to bring to work. Not only is paper rationed
13 in the Southern Local School District, but paper clips are rationed, time on the
14 copier is rationed, and art supplies, chalk, and even toilet paper are rationed.
15 The paper shortage is so severe in the Southern Local School District due to the
16 lack of adequate funding that the district does not even provide employees with

1 paychecks in envelopes. Resources are so scarce that to receive paychecks
2 during the summer months, teachers must provide the district with an envelope
3 and stamp if they wish to receive their checks by mail -- otherwise, the teachers
4 must pick up their checks in person.

5 • None of the appellant school districts are financially able to keep
6 up with the technological training needs of the students in the districts, which
7 makes it highly unlikely that the children of the appellant school districts will
8 be able to meaningfully compete in the job market against those students from
9 richer districts who receive a sufficient level of technological training.

10 • The trial court found that as of October 26, 1993, approximately
11 seventeen thousand Ohio high school seniors had not passed all parts of the
12 ninth grade proficiency exam after having at least six opportunities to do so.
13 The trial court also found that, on the average, pupils in school districts having
14 lower levels of taxable property have lower passage rates on the test than pupils
15 in districts with higher levels. Moreover, the trial court determined on the basis
16 of the information available that “[p]upils from high socio-economic

1 backgrounds have a greater likelihood of passing the ninth grade proficiency
2 tests. Those same pupils generally attend schools that have greater levels of
3 expenditure per pupil.” Additionally, the trial court determined that the
4 percentage of pupils passing all parts of the ninth grade proficiency test from
5 the appellant school districts is substantially less than the passage rates for the
6 wealthiest quintile of school districts in the state.

7 • As of the fall of 1993, thirty-two out of ninety-nine seniors in the
8 Dawson-Bryant Local School District had not passed all parts of the ninth
9 grade proficiency test. By contrast, only one out of one hundred high school
10 seniors in the Beachwood City School District near Cleveland (a school with a
11 large per-pupil expenditure) had not passed the ninth grade proficiency test.
12 That one student, however, had passed all but one part of the test. Further, that
13 student had been diagnosed as having severe learning problems. In the Lima
14 City School District, seventy-two out of two hundred sixty-eight seniors had
15 not passed and were in danger of not receiving a diploma. As of the time of
16 trial, only fifty-three percent of the juniors and thirty-seven percent of the

1 sophomores had passed all parts of the test. As of the fall of 1993, thirteen out
2 of one hundred fifty-four seniors at Northern Local had not passed all parts of
3 the proficiency test. As with all of the appellant school districts, the Northern
4 Local School District does not have sufficient funds to stop the high rate of
5 failures. Those funds that are available for intervention are expended, but that
6 merely takes away opportunities from other students who are in need of
7 attention. As of the time of trial, sixteen out of seventy-nine seniors in the
8 Southern Local School District had not passed all parts of the ninth grade
9 proficiency test. As of November 1993, three hundred of seven hundred
10 seventy-three seniors in the Youngstown City School District had not passed
11 all parts of the test. The trial court found and the evidence suggests that the
12 massive test failures would result in an increased student dropout rate. Most
13 inmates in Ohio's correctional institutions lack a high school diploma.
14 Obviously, the lack of a high school diploma deprives individuals of a number
15 of opportunities in life.

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Public School Buildings in the Plaintiff Districts

The evidence in this case and the trial court’s findings of fact pertaining to the condition of the school buildings in the appellant school districts and others provide compelling proof of the economic despair created by Ohio’s system of school funding. Some of the trial court’s most disturbing findings relating to the condition of the facilities and the evidence upon which the findings are based may be summarized as follows.

Dawson-Bryant

At the time of trial, there were four school buildings in operation in the Dawson-Bryant Local School District: Monitor Elementary, Deering Elementary, the intermediate school building, and the Dawson-Bryant High School. Dr. Lee R. McMurren, then superintendent of the Beachwood City Schools near Cleveland, testified concerning a tour he had taken through the Dawson-Bryant School District. According to McMurren, the materials used in the classrooms were worn and outdated. He observed special education classes

1 and testified that the types of classrooms used to educate the students were a
2 disgrace to the state of Ohio and to all Americans.

3 At the time of trial, Monitor Elementary had no location for breakfast or
4 lunch programs, no appropriate location for art and music classes, and no
5 location for a physical education program. There were no nursing facilities in
6 the event a child became ill. The library was small and dark, and could house
7 only about ten children at a time, with no room for the children to sit down and
8 browse through books. The building was not accessible to the handicapped.
9 The electrical wiring in the building limited the use of technology. At Monitor,
10 if more than three teachers plugged in fans at the same time, the breaker switch
11 would kick off because the wiring cannot handle the electrical current.

12 Deering Elementary was not accessible to the handicapped.
13 Handicapped students had to be carried to certain locations in the building.
14 There were no nursing facilities at Deering. Evaluations for identifying and
15 placing handicapped students were performed in a former closet with one light
16 bulb hanging from the ceiling and no heating or ventilation. Part of the

1 assessment required evaluation of fine motor activities which were extremely
2 difficult to perform in an unheated closet in the depth of winter. The trial court
3 found and the evidence indicates that from August 23, 1993 to August 30,
4 1993, the average afternoon temperature in the Deering Elementary building
5 was one hundred degrees downstairs and one hundred fifteen degrees upstairs
6 and in the cafeteria.

7 The intermediate school building was out of compliance with EPA
8 emissions standards. The coal heating system in the building was a health
9 hazard. Coal dust could be seen in the air within the building. The area used
10 for a band room was a former coal bin with no ventilation and no windows.
11 There was no kitchen or cafeteria in the building and no free breakfast program
12 could be offered. The building had no science laboratories and technology in
13 the school was limited. There was one shower room in the school, which was
14 shared by boys and girls. There was no art or music room. Special education
15 class was held in a former storage area. The Ohio Department of Education
16 had informed Dawson-Bryant of the need to move the special education

1 classroom; however, there was no place to move. From August 23, 1993 to
2 August 30, 1993, the average temperature in the building exceeded ninety-five
3 degrees.

4 There was no band or music room at Dawson-Bryant High School. The
5 library was located in a modular building that was not readily accessible to
6 students. Water and gas stations in the science laboratory were not functional.
7 Two special education classes were held in former storage areas. The kitchen
8 and cafeteria were insufficient to serve the students' needs. Classrooms were
9 cramped and noisy. The high school had coal-fired boilers which emitted
10 hazardous coal dust into the building. The only rooms in the entire building
11 with hot water were the home economics room, the cafeteria, and the locker
12 room. None of the restrooms had hot water.

13 In May 1993, the Dawson-Bryant Local School District was successful
14 in passing a bond issue that will allow the district to participate in the public
15 school building assistance program under the Classroom Facilities Act (R.C.
16 Chapter 3318). At the time of trial, the new facilities were expected to be

1 completed in 1995. The district's plans included closing Monitor Elementary
2 and the intermediate school buildings, making renovations and additions to
3 Deering Elementary to provide a centralized facility for kindergarten through
4 fifth grade, modifying and renovating the high school into a middle school
5 facility, and building a new high school. However, the trial court found that
6 significant problems will remain even after completion of the project due to the
7 lack of sufficient funding.

8 *Lima City School District*

9 The trial court found that the Lima City School District cannot raise
10 enough money through the passage of a construction levy to meet its facility
11 needs. At the time of trial, the district operated sixteen school buildings that
12 housed pupils, *i.e.*, eleven elementary school buildings, three middle schools, a
13 high school and an alternative high school.

14 Three of the elementary school buildings were built in the 1920s and
15 contained significant amounts of asbestos in the ceilings and piping. The

1 plumbing in the buildings was deteriorating and there was great need for
2 updated electrical service. To provide new electrical service would be
3 extremely costly, since running additional wiring through the floors or ceilings
4 would disturb the asbestos, resulting in substantial effort and expense to
5 prevent friable asbestos from escaping into the air. At the time of trial, only
6 one of the eleven elementary schools was accessible to the handicapped.

7 South Middle School in Lima is an ancient building. Testimony
8 established that its electrical problems are so bad that maintenance personnel
9 have to wear rubber gloves and rubber vests to work on the electrical panel. In
10 the fall of 1993, a portion of the exterior of the building collapsed onto a
11 sidewalk. Fortunately, there were no injuries to students who used the
12 sidewalk to enter and leave the building. Certain portions of the building that
13 did not collapse are similar in design to the portion of the building that did
14 collapse. Thus, the building is in great need of repair. Lima operated a total of
15 three middle schools, none of which met ADA requirements for accessibility to
16 the handicapped.

1 At the time of trial, many of the school buildings in the Youngstown City
2 School District were in a state of disarray with bad roofs, overcrowded
3 classrooms, and a host of other problems. Building maintenance was
4 performed on an emergency basis only. The 1990 Facilities Survey identified
5 approximately \$67 million in needs for the Youngstown schools. Very few of
6 these needs had been addressed by the time of trial. All capital improvements
7 had been put on hold due to a lack of funds. Overcrowding and high student-
8 to-teacher ratios had become common in several of the school buildings.
9 Asbestos removal and architectural barrier abatement needs could not be met
10 due to lack of funds. The following findings of fact by the trial court sum up
11 the state of affairs in many of the Youngstown city schools, and provide a
12 unique perspective on the educational opportunities available to pupils in the
13 Youngstown City School District:

14 “The John White Elementary School building has a metal building
15 addition that * * * [i]n the summer * * * heats up during the day so the students
16 can hardly bear to be in their rooms, and in winter it stays so cold there is often

1 frost on the interior walls. The building also houses special education and
2 remediation students in a portable unit. The library * * * has been divided to
3 create more classroom space, so there is not sufficient library space. There is
4 no computer lab[;] computers are placed on carts for intervention classes.

5 “* * *

6 “The Lincoln Elementary School has some grades which are
7 overcrowded, computers on carts, and insufficient recreational space. The
8 playground doubles as a parking lot for staff and a shooting gallery for the
9 neighborhood.

10 “* * *

11 “The Martin Luther King Elementary School is beginning to have
12 extensive roof leaks which the district has been unable to address due to lack of
13 funds. The building is not handicapped accessible. The Martin Luther King
14 Elementary building has security problems, and equipment has been stolen
15 from the building.

1 Recently, the Southern Local School District was successful in obtaining
2 funds under the Classroom Facilities Act together with the passage of the
3 necessary tax levy and bond issue to provide new school facilities in the
4 district. However, the need for the new facilities had existed since 1980. The
5 Southern Local School District had over eight hundred improperly housed
6 students identified in connection with its application for Classroom Facilities
7 Act assistance. The trial court’s findings concerning the state of the Southern
8 Local schools prior to the completion of the renovation project are nothing less
9 than staggering, and the fact that the schools were ever allowed to reach that
10 point is simply outrageous. This case was commenced in 1991. Some of the
11 trial court’s findings concerning the Southern Local schools as they existed up
12 to and during the time this case was litigated convincingly demonstrate how far
13 some of Ohio’s districts have sunk under the current system of school funding:

14 “When Superintendent [Carol] Spangler was employed in August 1991,
15 elementary students were house[d] at New Straitsville Elementary, Corning
16 Elementary, and Moxahala Elementary; junior high students were housed at

1 Miller Junior High at Shawnee, and high school students were housed at Miller
2 High School. The New Straitsville and Shawnee buildings were built around
3 1915, with Shawnee having some additions after that. Moxahala and Corning
4 were both built in the 1920s.

5 “As a result of the lack of resources for comprehensive maintenance and
6 upkeep, all of the buildings, other than the high school, were in very poor
7 condition in 1991 when Ms. Spangler became Superintendent. The heating,
8 electricity, ventilation, plumbing, and sewage systems in the elementary and
9 junior high buildings needed comprehensive repair. The sewage system at
10 New Straitsville Elementary would flood over State Route 93 on occasion.
11 Incidents such as the temperature in Moxahala’s gym being only 20 degrees
12 were not uncommon. * * * Asbestos was a primary concern in the elementary
13 and junior high buildings. At Shawnee, the major part of the building was
14 constructed with asbestos in the lower layer of the plaster. Because plaster was
15 falling, some mornings the custodian and principal at the Shawnee building
16 would go into rooms and knock plaster off the ceilings so that big chips would

1 not fall on students during the day. * * * At Shawnee, the roof leaked, the
2 lighting was poor, the heating was inconsistent, and there was no hot water in
3 the bathrooms.

4 “Louis Altier, President of the Southern Local Board of Education,
5 testified that he has farm animals that are housed better than students were
6 housed in the Shawnee building. Whereas his animals were dry and warm, that
7 could not be said about the students in the Shawnee building.

8 “The district did not have the financial resources to completely replace
9 electrical systems and plumbing systems, to remove asbestos, and to perform
10 the comprehensive maintenance that was necessary to keep the buildings in a
11 safe condition.

12 “* * *

13 “Chris Thompson attended the New Straitsville Elementary for
14 kindergarten, for the two weeks he spent in 2nd grade before being advanced a
15 grade, and for 3rd grade (1984-85 and 1986-87). The building gave

1 Christopher ‘a dirty feeling.’ There was plaster falling off the walls and
2 ceilings and cockroaches had been seen crawling on the floor in the restrooms.
3 Chris avoided using the restrooms at all while at school; he waited the entire
4 school day to use the bathroom at home. The gymnasium floor was warped and
5 it was so small that Chris found it difficult to play some sports because students
6 would run into the walls. * * * The library was very small with inadequate
7 book supplies and with outdated books. Following a storm, the roof leaked and
8 a large piece of the ceiling fell onto the floor and the library was closed for
9 about two to three weeks. * * *

10 “In the 4th through 6th grades, Chris Thompson attended the Corning
11 Elementary building (1987-88 and 1989-90). The building was very dirty, the
12 bathrooms had cockroaches and other creatures crawling on the floors, possibly
13 silverfish. A leaking roof was a real problem. In math class, water dripped like
14 a waterfall from the ceiling into a bucket after rains. Sometimes, the students
15 had to ask the teacher to be moved because the water was splashing on them.
16 After a hard rain the night before, the constant drip into the bucket was very

1 annoying. The library at Corning was very small with an inadequate supply of
2 books and with outdated books. The science room was next to the furnace
3 room, which made the science room very noisy, and it was hard for the students
4 to concentrate or to hear the teacher talk. Plaster was falling off the walls at the
5 Corning building.

6 “Chris Thompson attended the Shawnee building for the 1st grade (1985-
7 86) and for the 7th and 8th grades (1990-91 to 1991-92). In the six years
8 between his 1st grade and the 7th grade attendance, the building really had not
9 changed much. The floors at Shawnee were warped, plaster was falling off the
10 walls, and there were large holes in the walls in the front part of the building. *

11 * *

12 “When Chris Thompson was at Shawnee, the gymnasium had a leaking
13 roof, and at one time part of the gym was flooded due to leakage. When a ball
14 hit the ceiling while students were playing kickball or volleyball, part of the
15 ceiling came down. The locker rooms below the stage area and adjacent to the
16 gym had almost no water pressure, stunk, and were unfit for student use.

1 Students changed clothes in two storage rooms next to the stage, but had no
2 shower facilities available.

3 “When Chris Thompson began to attend high school, the high school
4 building did not have heat due to construction and renovation of the heating
5 system in the fall of 1992 until the end of November or the beginning of
6 December. Students had to wear coats and gloves to classes, and were
7 subjected to fumes from large kerosene heaters when the building got very
8 cold.

9 “* * * All of the pupils who attended the elementary and middle school
10 buildings at Southern Local remained improperly housed until the fall of
11 1993.” (Citations to evidence omitted.)

12 As a result of the passage of a 1990 local tax levy and state assistance
13 provided through the Classroom Facilities Act, the district completed, in 1993,
14 the construction of new elementary and middle school facilities. Shawnee,
15 Moxahala, New Straitsville and Corning schools were closed. The new

1 facilities have had a very positive effect on students and their performance.
2 However, the new facilities have still left the district with numerous unmet
3 facility needs. Miller High School was somewhat improved during the
4 construction project, but the improvements were not nearly sufficient to correct
5 the ills plaguing that facility. The district apparently does not raise enough
6 funding to properly furnish the new facilities and will likely be unable to keep
7 the new facilities in a state of good repair. Further, the district faced (and
8 probably still faces) a problem as to what to do with the facilities that are no
9 longer in use. It was estimated that to demolish Shawnee would cost the
10 district \$800,000. The district owns three other facilities that are no longer in
11 use as schools. The district needs money to deal with these properties in a
12 responsible manner.

13 *Northern Local School District*

14 The plight of the Northern Local School District is truly tragic, as
15 reflected by the trial court's findings of fact. As of the time of trial, Northern
16 Local was thirtieth in line to get on the list of school districts approved for

1 Classroom Facilities Act funding. The significance of this fact should not be
2 overlooked. If Northern Local was not immediately entitled to funding for its
3 facilities, it makes me wonder how disastrous the situation is in other school
4 districts across this state and how long it will take for the needs of the districts
5 to be addressed under the current system of school funding.

6 In July or August 1992, the bricks were bulging out near the parapet at
7 the north end of the Somerset Elementary School. An engineer examined the
8 building and recommended that it be closed. The Department of Education
9 inspected the building and observed that the bricks on the parapet walls were
10 bowed out and represented a hazard to pupils. The Department of Education
11 strongly recommended that the facility be closed for safety reasons. The school
12 district sought emergency financial help from the Department of Education and
13 others, but was told that there was no money available to aid the district in
14 addressing its emergency situation.

15 In October 1992, the Northern Local School District Board of Education
16 decided to close the Somerset school building. Before the building was closed,

1 the district erected scaffolding around the entire building and canopies over
2 doorways to protect students from falling bricks. When Somerset was finally
3 closed, some of the students were required to be temporarily educated in
4 facilities within the New Lexington School District. Busing the children to
5 New Lexington on a daily basis resulted in the children missing part of the
6 school day. As a result of the closing of Somerset Elementary, classes
7 throughout the Northern Local School District had to be rearranged to
8 accommodate the displaced Somerset school students.

9 At the time of trial, Glenford Elementary School was housed in two
10 separate buildings. The windows and roofs of both buildings leaked, the
11 lighting was bad, and the restroom facilities were deplorable. State Route 204
12 runs between the two buildings. The road is heavily traveled, especially by
13 trucks transporting sand. Kindergarten through second grade students must
14 cross the highway up to five times a day for, among other things, lunch and
15 recess. The restrooms smell bad, look terrible, and are in need of replumbing.
16 Because of limited class space, kindergarten students must climb three flights

1 of stairs to use a bathroom. The roof in one of the buildings leaks even when it
2 is not raining due to water trapped between layers in the roof. In November
3 1992, the Ohio EPA found high levels of arsenic in the water wells that service
4 the Glenford school buildings. The district sought financial aid from the state
5 to address this problem, but no aid was forthcoming.

6 At Thornville Elementary, the roof and windows leak continually.
7 Particle board was placed over peeling plaster. In the summer of 1993, when a
8 piece of particle board was removed, maggot and ant infestations were
9 discovered. The mortar is decaying and needs to be replaced or repaired.

10 Recently, Northern Local was informed by an engineer employed to
11 study the district's facility problems that if the Thornville and Glenford
12 buildings were not renovated they would have to be closed. Given the debt
13 limitation of R.C. 133.06, the district could not borrow enough to construct a
14 building complex to house students in kindergarten through eighth grade. To
15 build such a building, the district would have had to generate somewhere
16 between \$14 and \$15 million. As of November 1993 the total assessed

1 valuation in the district was approximately \$90 million. The R.C. 133.06 debt
2 limits restrict the district to nine percent of the district's total assessed
3 valuation except under specified conditions. Thus, a new complex was not an
4 option. Accordingly, the school board proposed to renovate Glenford,
5 Thornville, Somerset, and the junior/senior high complex to meet the district's
6 needs. To achieve that goal, the board put a \$6.5 million bond issue before the
7 voters in May and August 1993. The issue failed. The board placed another
8 bond issue before the voters in November 1993 for \$6.3 million (5.26 mills),
9 which would not have been nearly enough for the district to take care of its
10 facilities needs. That issue failed as well. The trial court found that the
11 facilities in Northern Local "had not changed in the past 20 years."

12 III

13 Constitutional Guarantees Related to Public Education

14 The history of some of Ohio's constitutional provisions relating to
15 education is simply fascinating. Some of the history is set forth below to

1 emphasize the important role education has played in the development of our
2 state and nation.

3 Following the Revolutionary War, the Confederate Congress, in the
4 Land Ordinance of May 20, 1785, provided for the surveying and sale of lands
5 in what was then known as the Western Territory. That territory, as described
6 in the ordinance, included lands that would eventually become Ohio. In the
7 Land Ordinance, Congress reserved one thirty-sixth of every township in the
8 Western Territory expressly for the maintenance of public schools, stating:
9 “There shall be reserved the lot No. 16, of every township, for the maintenance
10 of public schools within the said township.” 1 Laws of the United States 563,
11 565. Since the townships under the congressional survey were to be six miles
12 square, this meant that a section of every township measuring one mile square
13 would be devoted to educational use. Spayde, Lewis & Jollay, Baldwin’s Ohio
14 School Law (1984) 2, Section 1.03. “It was the intention of Congress in
15 making this generous grant that these lands, approximately 704,488 acres in all,
16 intelligently managed, would support the public schools of the state in

1 perpetuity, so that there would be no need to tax the citizens for the cost of
2 operating the public school system.” *Id.*

3 Following the enactment of the 1785 Land Ordinance, a group of land
4 speculators incorporated to form the Ohio Company of Associates. See,
5 generally, IV Dictionary of American History (1940) 162-163. This group,
6 represented by Reverend Manasseh Cutler, contracted with Congress for the
7 purchase of a large section of the public lands northwest of the Ohio River. *Id.*
8 The terms of the negotiated agreement stipulated support for public education,
9 requiring that lot No. 16 of each township was to be given perpetually to the
10 purposes stated in the Land Ordinance of 1785, *i.e.*, the maintenance of public
11 schools. The agreement also included a provision that not more than two
12 complete townships of good land were to be given perpetually to the purposes
13 of a university. See, generally, Swan, Land Laws For Ohio (1825) 15-25
14 (documenting provisions of law leading to the acquisition of lands by the Ohio
15 Company of Associates). The provisions of this agreement formed the basis
16 for other land purchases in the Ohio country. *Id.* at 26 *et seq.*

1 In 1787, the Confederate Congress enacted the Northwest Territory
2 Ordinance to provide for the government of the territory and the eventual
3 establishment of states northwest of the Ohio River. The Northwest Territory
4 Ordinance of 1787 provided, as an article of compact between the original
5 states and the inhabitants of the territory northwest of the Ohio River, that:
6 “Religion, morality, and knowledge being necessary to good government and
7 the happiness of mankind, schools and the means of education shall forever be
8 encouraged.” Section 14, Article III, Northwest Territory Ordinance of 1787.
9 1 Laws of the United States 475, 479. The means of forever encouraging the
10 schools had been set forth in the Land Ordinance of 1785, in which lot No. 16
11 of every township was reserved for the maintenance of public education.

12 The Land Ordinance of 1785 and the Northwest Territory Ordinance of
13 1787 set the stage for the development of the Northwest Territory into
14 stabilized promised lands. The plan for stabilization revolved around a means
15 of public education. Hyman, *American Singularity* (1986) 23-24, states that:

1 “Visions of the West as a nursery of republican virtues over a vast
2 continent whose very boundaries were still unknown in 1787 excited
3 Confederation congressmen in New York City and the framers of the
4 Constitution in Philadelphia. Fee-simple ownership by large numbers of
5 smallholders would transform the frontier, where civilization was at risk, into
6 settlements where morality and laws (including the responsibilities to repay
7 debts) would be honored and national cohesion maintained. Publicly supported
8 education, a topic of the 1785 and 1787 statutes, would create literate, free
9 farmers who would staff the governments sketched in the 1787 law. Because
10 settlers derived their titles to land and attendant property from the nation, these
11 unservile land-busters and their children, whose right to education was also a
12 statutory duty of government, would be linked in grateful loyalty to the nation
13 and to the new state they had conceived.

14 “This goal of linkage makes understandable why the Northwest
15 Ordinance implanted commitments to public education in the territorial
16 chrysalis of future states. In planning the republic, most supporters of the

1 Constitution and the ordinance espoused not-yet Federalist ‘loose construction-
2 internal improvement’ doctrines and policies. In addition to advocating roads,
3 turnpikes, canals, and forts, such supporters gave priority to various forms of
4 public education, all aiming to make the frontier quickly interdependent with
5 the dismayingly distant East. * * * Therefore, the 1787 Ordinance is known
6 for its Article III, on schools: ‘Religion, morality, and knowledge being
7 necessary to good government and the happiness of mankind, schools and the
8 means of education shall forever be encouraged.’” (Footnote omitted.)

9 On November 1, 1802, delegates assembled in Ross County, Ohio, for
10 the purpose of establishing a state government and constitution for Ohio. The
11 delegates expressed their views on the fundamental importance of education by
12 adopting, as part of the Ohio Constitution of 1802, two significant provisions.
13 Specifically, Section 3, Article VIII of the Ohio Constitution of 1802 repeated
14 the requirement of the Northwest Territory Ordinance that schools and the
15 means of instruction must forever be encouraged. Section 3, Article VIII of the
16 Ohio Constitution of 1802 provided, in part: “But religion, morality and

1 knowledge, being essentially necessary to good government and the happiness
2 of mankind, schools and the means of instruction shall forever be encouraged
3 *by legislative provision*, not inconsistent with the rights of conscience.”

4 (Emphasis added.) In addition, the delegates at the 1802 Constitutional
5 Convention agreed to the following language contained in Section 25, Article
6 VIII of the 1802 Ohio Constitution: “That no law shall be passed to prevent
7 the poor in the several counties and townships within this state from an equal
8 participation in the schools, academies, colleges and universities within this
9 state, which are endowed, in whole or in part, from the revenue arising from
10 donations made by the United States, for the support of schools and colleges;
11 and the doors of the said schools, academies and universities, shall be open for
12 the reception of scholars, students and teachers, of every grade, without any
13 distinction or preference whatever, contrary to the intent for which said
14 donations were made.” Clearly, given the munificent land grants by Congress
15 in support of public education, the framers of the 1802 Ohio Constitution had
16 great expectations that Ohio’s public school system, aided by legislative

1 provision, would be adequate to afford an outstanding education (not just a
2 rudimentary education) to the entire population.

3 Ohio's second Constitutional Convention occurred in 1850-1851.

4 Similar to the provisions of Section 3, Article VIII of the Ohio Constitution of

5 1802, Section 7, Article I of the Ohio Constitution of 1851 provides, in part:

6 "Religion, morality, and knowledge, however, being essential to good

7 government, it shall be the *duty of the General Assembly to pass suitable laws,*

8 to protect every religious denomination in the peaceable enjoyment of its own

9 mode of public worship, and *to encourage schools and the means of*

10 *instruction.*" (Emphasis added.) Additionally, underscoring the importance of

11 intellect and instruction, the delegates to the 1850-1851 Ohio Constitutional

12 Convention devoted an entire Article of the Constitution (Article VI) to the

13 subject of public education.

14 Section 2, Article VI of the Ohio Constitution, which has remained

15 unaltered since its adoption in 1851, provides: "The general assembly shall

16 make such provisions, by taxation, or otherwise, as, with the income arising

1 from the school trust fund, will secure a thorough and efficient system of
2 common schools throughout the State; but no religious or other sect, or sects,
3 shall ever have any exclusive right to, or control of, any part of the school
4 funds of this State.” The debates from the 1850-1851 Constitutional
5 Convention provide some insight into the purpose of Section 2, Article VI of
6 the Ohio Constitution.

7 The delegates to the 1850-1851 Ohio Constitutional Convention clearly
8 viewed education as the duty of government and the right of all people
9 regardless of their station in life. During the convention there were heated
10 debates over the subject of education. For example, on Wednesday, December
11 4, 1850, the convention considered a report of the standing committee on
12 education. II Report of the Debates and Proceedings of the Convention for the
13 Revision of the Constitution of the State of Ohio, 1850-51 (1851) (“Debates”)
14 at 10. The report recommended adoption of three sections, one of which
15 provided: “The General Assembly shall make such provision by taxation and
16 other means (in addition to the income arising from the irreducible fund) as

1 will secure a thorough and efficient system of Common Schools, free to all
2 children in the State.” *Id.* at 11. During the debates concerning this section of
3 the report, William Sawyer of Auglaize County rose to propose an amendment
4 that free public education be provided to white children only. *Id.* The
5 proposed amendment did not fare well at the convention. James Taylor of Erie
6 County rose to address the proposal. Portions of his stirring speech are entirely
7 worthy of quotation here. Directing his comments to the racist inclinations of
8 Mr. Sawyer, Taylor stated:

9 “I confess, sir, that I am surprised. I did not expect that a motion of this
10 kind would be made by any gentleman on this floor. I did not, on the other
11 hand, suppose that any proposition to extend the political rights of the colored
12 citizens of Ohio would be adopted; but I had supposed that a knowledge of the
13 law of self-preservation would have suggested to the gentleman from Auglaize
14 [Mr. Sawyer] and to every gentleman upon the floor, that it would be good
15 policy to give to all within the reach of our laws a good moral and intellectual
16 training. I knew that this Convention was not prepared to increase the political

1 rights of the black man; but I had hoped that all were willing to provide against
2 his becoming the pest of society, by being deprived of all opportunities for
3 education. Shall we not secure protection to ourselves and our children by
4 relieving the colored population of Ohio, from the absolute necessity of
5 growing up in vice and ignorance? Shall we, by the adoption of the
6 amendment of the gentleman from Auglaize, constitute a class who will
7 become the inmates of our poor houses, and the tenants of our jails? I think it
8 must be clear to every reflecting mind that the true policy of the statesman is to
9 provide the means of education, and consequent moral improvement, to every
10 child in the State, the offspring of the black man equally with that of the white
11 man, the children of the poor equally with the rich. * * *

12 * * *

13 * * * Education will tend to make men moral and useful members of
14 society, therefore let us provide for the education of every child in this state.”

15 Debates at 11.

16 William Bates of Jefferson County stated:

1 “View this question as you will -- as a matter of morality or of political
2 economy, a question of right or expediency, the State would materially suffer if
3 a provision to exclude any class of children from the benefits of common
4 schools, should be engrafted in the new Constitution. The experience of the
5 past has shown that morality and virtue keeps pace with education and that
6 degradation and vice are the inevitable results of ignorance. Good policy,
7 humanity, and above all, the spirit of the Christian religion, demands that we
8 should provide for the education of every child in the State.” Debates at 13.

9 Following Mr. Taylor’s and Mr. Bates’s statements and others, a motion
10 was made to amend the section of the report to provide for a set amount of
11 annual expenditures for the purpose of securing a thorough and efficient system
12 of common schools available to all children in the state. Debates at 13. While
13 this proposal was not adopted, it drew many statements reflecting how strongly
14 the delegates felt about the importance of education. For example, consider the
15 eloquent speech of Samuel Quigley of Columbiana County, a physician:

1 “The third section of the report directs the Legislature to make full and
2 ample provision for securing a thorough and efficient system of common
3 school education, free to all the children in the State. The language in this
4 section is expressive of the liberality worthy [of] a great State, and a great
5 people. That this is an age of improvement and progress is admitted by all who
6 are acquainted with the great and important transactions of the present century.
7 That a spirit of education is increasing in our beloved country is known from
8 common observation, and should not only be hailed, but cherished with delight.

9 “Science has dispelled the darkness from our land which for ages
10 benighted the inhabitants of the old world, and gave the tyrant power to sway
11 an iron sceptre over their subjects, and by discouraging instruction and keeping
12 them in ignorance, perpetuated their servitude -- continued them in degradation
13 -- shackled with despotic chains, not knowing that they were men capable of
14 being free and governing themselves. This condition of things has become
15 changed -- intelligence, the truth of divine revelation -- liberty of conscience --
16 self-government -- freedom of the press -- free and fair discussion, together

1 with freedom of thought, have brought our free citizens from under the
2 dominion of tyranny, declaring and demonstrating to the world that great truth,
3 that men are born free and equal and capable of governing themselves. Had not
4 knowledge been shed upon the human understanding, all would have remained
5 in the darkness of heathenism, and governed by superstition and fanaticism, our
6 country would have still borne testimony to savage cruelty; the banks of our
7 majestic Ohio would have been the theatre of the war dance and deeds of
8 savage cruelty.

9 “* * *

10 “Intelligence is the foundation-stone upon which this mighty Republic
11 rests -- its future destiny depends upon the impulse, the action of the present
12 generation in the promotion of literature. Will we not, are we not, as patriots,
13 bound in solemn duty to use our energies, our influence to forward this greatest
14 of interests to present and future generations; and especially will the great State
15 of Ohio fall short in so mighty an enterprise -- so essential and indispensable a
16 duty? * * * Arouse, then, citizens of Ohio, to your best interests, and show

1 that you are not only able to compete in agriculture, in public improvement, in
2 commerce -- yes, and in the battlefield, with other States, but also in
3 intelligence.” Debates at 14-15.

4 One of the delegates (William Hawkins of Morgan County) provided
5 particularly clear insight into the concept of a “thorough and efficient” system
6 of public education. He was “opposed to too great minuteness in the detail of
7 our Constitution” concerning the specifics of education, but observed, “[W]e
8 are warranted by public sentiment in requiring at the hands of the General
9 Assembly *a full, complete and efficient system of public education.*”
10 (Emphasis added.) Debates at 16. He stated: “Enjoin upon the Legislature the
11 duty of establishing an efficient system [of education], and we shall have done
12 our duty.” *Id.*

13 Following these and other discussions, the report was recommitted to the
14 standing committee on education. Debates at 18. Its revised report
15 recommended adoption of the following:

1 “The General Assembly shall make such provisions, by taxation or
2 otherwise, as, with the income arising from the school trust funds, will secure a
3 thorough and efficient system of common schools throughout the State, and
4 place the means of instruction in the common branches of education, for a
5 suitable portion of the year, within the reach of all the children therein, of
6 suitable age and capacity for learning; Provided, that no religious or other sect
7 or sects, shall ever have any exclusive right to, or control of any part of the
8 school funds of this State.” Debates at 698.

9 John Larwill of Wayne County moved to amend the first line of this
10 section by striking the word “shall” and inserting the word “may.” *Id.* at 699.

11 The proposed amendment was rejected without discussion. Mr. McCormick of
12 Adams County then moved to amend the same section by striking out the
13 words “a suitable portion,” and substituting in lieu thereof the words “at least
14 six months.” *Id.* This and other proposals concerning the length of the school
15 year were rejected upon a majority consensus that such matters are to be left for
16 the legislature to determine. Debates at 699 *et seq.*

1 The eventual product of the debates was the current version of Section 2,
2 Article VI, mandating that the General Assembly “shall make such provisions,
3 by taxation, or otherwise, as, with the income arising from the school trust
4 fund, will secure a thorough and efficient system of common schools
5 throughout the State.” As the Supreme Court of West Virginia recognized in
6 reviewing the debates surrounding the adoption of Section 2, Article VI of the
7 Ohio Constitution:

8 “There was no explicit definition of the words ‘thorough and efficient’
9 that appeared in the final committee report which the 1851 Ohio Convention
10 adopted. The tenor of the discussion, however, by those advocating the entire
11 education section as it was finally adopted, leaves no doubt that excellence was
12 the goal, rather than mediocrity; and that education of the public was intended
13 to be a fundamental function of the state government and a *fundamental right*
14 of Ohioans.” (Emphasis added.) *Pauley v. Kelly* (1979), 162 W.Va. 672, 685,
15 255 S.E.2d 859, 867.

1 The trial court found that education was a fundamental constitutional
2 right and that Ohio’s system of school funding violated Section 2, Article VI,
3 requiring the General Assembly to provide a thorough and efficient system of
4 common schools. Other constitutional provisions the trial court relied upon in
5 striking down Ohio’s school funding laws are as follows:

6 (1) Section 2, Article I of the Ohio Constitution, which provides that:

7 “All political power is inherent in the people. Government is instituted
8 for their equal protection and benefit, and they have the right to alter, reform,
9 or abolish the same, whenever they may deem it necessary; and no special
10 privileges or immunities shall ever be granted, that may not be altered, revoked,
11 or repealed by the General Assembly.”

12 (2) Section 26, Article II, which states:

13 “All laws, of a general nature, shall have a uniform operation throughout
14 the State; nor shall any act, except such as relates to public schools, be passed,
15 to take effect upon the approval of any other authority than the General
16 Assembly, except, as otherwise provided in this constitution.”

1 (3) Section 3, Article VIII, which states:

2 “Except the debts above specified in sections one and two, no debt
3 whatever shall hereafter be created by or on behalf of the State.”

4 (4) Section 4, Article XII, which states:

5 “The General Assembly shall provide for raising revenue, sufficient to
6 defray the expenses of the State, for each year, and also a sufficient sum to pay
7 principal and interest as they become due on the state debt.”

8 While I have reviewed them, I make no comment regarding items (2), (3)
9 and (4) immediately above because comment is not necessary in arriving at the
10 conclusions reached herein.

11 IV

12 *Cincinnati City School Dist. Bd. of Edn. v. Walter*

13 In *Walter*, 58 Ohio St.2d 368, 12 O.O.3d 327, 390 N.E.2d 813, this court
14 reviewed constitutional challenges to the General Assembly’s enactment of the
15 Equal Yield Formula for computing state aid. See discussion in Part II, *supra*.
16 The formula was designed to provide an equal sum of combined state and local

1 funds, on a per-mill per-pupil basis, for each qualifying school district. The
2 formula provided a two-tiered system of funding -- every school district
3 received an amount per pupil per mill for the first twenty mills and additional
4 amounts were given to each school district with millage above twenty mills up
5 to thirty mills. The court in *Walter* discussed the applicable test for
6 determining whether the Equal Yield Formula violated the Equal Protection
7 Clause of the Ohio Constitution, stating:

8 “Simply stated, the test is that unequal treatment of classes of persons by
9 a state is valid only if the state can show that a rational basis exists for the
10 inequality, unless the discrimination impairs the exercise of a fundamental right
11 or establishes a suspect classification. * * * If the discrimination infringes
12 upon a fundamental right, it becomes the subject of strict judicial scrutiny and
13 will be upheld only upon a showing that it is justified by a compelling state
14 interest. That is, once the existence of a fundamental right or a suspect class is
15 shown to be involved, the state must assume the heavy burden of proving that

1 the legislation is constitutional.” *Walter* at 373-374, 12 O.O.3d at 330, 390
2 N.E.2d at 818.

3 In discussing whether education was to be considered a fundamental
4 right guaranteed by the Ohio Constitution, the court in *Walter* cited *San*
5 *Antonio Indep. School Dist. v. Rodriguez* (1973), 411 U.S. 1, 93 S.Ct. 1278, 36
6 L.Ed.2d 16. *Walter* at 374, 12 O.O.3d at 331, 390 N.E.2d at 818. *Rodriguez*
7 sets forth the test for determining whether education is a fundamental right
8 under the United States Constitution. The *Rodriguez* test is whether the
9 Constitution implicitly or explicitly guarantees a right to education. *Rodriguez*
10 at 33-34, 93 S.Ct. at 1297, 36 L.Ed.2d at 43. *Walter* recognized that “if this
11 court were to accept this test, educational opportunity would be a fundamental
12 interest entitled to strict scrutiny.” *Walter* at 374, 12 O.O.3d at 331, 390
13 N.E.2d at 818. The court in *Walter* rejected the *Rodriguez* test, however,
14 finding a distinction between the grant of powers of the United States
15 Constitution and the Ohio Constitution. *Id.* at 374-375, 12 O.O.3d at 331, 390
16 N.E.2d at 818-819. The court stated that “because this cause deals with

1 difficult questions of local and statewide taxation, fiscal planning and
2 education policy, we feel that this is an inappropriate cause in which to invoke
3 ‘strict scrutiny.’ This case is more directly concerned with the way in which
4 Ohio has decided to collect and spend state and local taxes than it is a
5 challenge to the way in which Ohio educates its children.” *Id.* at 375-376, 12
6 O.O.3d at 331-332, 390 N.E.2d at 819. The *Walter* court rejected the equal
7 protection challenges to the Equal Yield Formula, finding that the per-pupil
8 expenditure disparities in Ohio could be rationally justified on the basis of local
9 control of education, *i.e.*, each local school district could develop programs to
10 meet perceived local needs. *Id.* at 376-382, 12 O.O.3d at 332-335, 390 N.E.2d
11 at 819-822. The court in *Walter* also rejected an argument that the Equal Yield
12 Formula violated the Thorough and Efficient Clause of the Ohio Constitution,
13 finding insufficient proof of a violation of the standards set forth in *Miller v.*
14 *Korns* (1923), 107 Ohio St. 287, 140 N.E. 773. *Walter* at 386-388, 12 O.O.3d
15 at 337-339, 390 N.E.2d at 824-826. See discussion of *Miller* in Part V, *infra*.

1 The trial court found that *Walter* was not controlling precedent on the
2 issues involved in the case at bar. The court of appeals disagreed, concluding
3 that the system of educational funding had not substantially changed since
4 *Walter* was decided and that, therefore, *Walter* dictated a finding that Ohio's
5 current scheme of school funding is constitutionally acceptable. However, I
6 find that *Walter* is clearly *not* controlling in the case at bar.

7 The Equal Yield Formula at issue in *Walter* was repealed shortly after
8 *Walter* was decided. The case at bar involves a funding scheme entirely
9 different from that applicable in *Walter*. Moreover, *Walter* involved a
10 challenge to only one aspect of school funding. Conversely, the case at bar
11 involves a wholesale constitutional attack on the entire system of school
12 funding, including the impact of tax reduction factors, mandated programs of
13 school district borrowing, the inadequacy of classroom facilities, etc. Further,
14 and perhaps most important, the decision in *Walter* clearly indicates that the
15 General Assembly had provided in the legislation at issue in *Walter* a funding
16 level under the Equal Yield Formula of \$960 per pupil at twenty mills up to

1 \$1,380 per pupil at thirty mills. *Walter*, 58 Ohio St.2d at 371, 12 O.O.3d at
2 329, 390 N.E.2d at 817. The court in *Walter* specifically determined that the
3 General Assembly had enacted the legislation to ensure \$960 per pupil upon
4 the recommendation of a joint, nonpartisan legislative committee that found
5 that a \$960 guarantee at the twenty-mill level was sufficient to provide the
6 means for an adequate educational program of high quality in each district.
7 *Walter* at 371-372 and 382, 12 O.O.3d at 329 and 335, 390 N.E.2d at 817 and
8 822, and fn. 1. The evidence in the case at bar clearly indicates that the
9 funding level set by today's School Foundation Program has absolutely no
10 connection with what is necessary to ensure a high quality education. Indeed,
11 evidence in the record clearly demonstrates that the minimum funding level of
12 the School Foundation Program has not been adequate to ensure a high quality
13 education in each of Ohio's public school districts. Testimony indicated that a
14 formula amount of \$4,000 per pupil was necessary at the time this case was
15 tried, whereas the General Assembly had set the basic per-pupil funding
16 amount at about seventy percent of that rate. Further, at oral argument, both

1 Justice Resnick and Justice Pfeifer established by their questioning that neither
2 the General Assembly nor the Department of Education had commenced any
3 study or made any finding as to the cost of a minimum level of education.
4 Likewise at oral argument, the State Solicitor of the Office of the Attorney
5 General of the state of Ohio conceded that if funding for primary and/or
6 secondary education fell below the level necessary to provide every student a
7 free basic, adequate education (a “floor,” he called it), that would be violative
8 of our Constitution.

9 The trial court held that this court’s decision in *Walter* “is confined to its
10 own set of facts.” I agree. The times and the law have changed since *Walter*
11 was decided. In the 1970s, the system of school funding then in effect was
12 determined to be constitutional. That system, the Equal Yield Formula was, for
13 whatever reason, abandoned shortly after *Walter* was decided. Today, the
14 record before this court leads to the inescapable conclusion that Ohio’s system
15 of school funding cannot be reconciled with the applicable constitutional
16 mandates concerning public education.

The Thorough and Efficient Clause of Section 2, Article VI

In *Miller v. Korn*s, 107 Ohio St. at 297-298, 140 N.E. at 776, this court stated that:

“Section 2, Article VI of the Ohio Constitution, provides as follows:

“The General Assembly shall make such provisions, by taxation, or otherwise, as, with the income arising from the school trust fund, *will secure a thorough and efficient system of common schools throughout the state.* * * *

“This declaration is made by the people of the state. It calls for the upbuilding of a system of schools throughout the state, and the attainment of efficiency and thoroughness in that system is thus expressly made a purpose, not local, not municipal, but state-wide.

“With this very state purpose in view, regarding the problem as a state-wide problem, the sovereign people made it mandatory upon the General Assembly to secure not merely a system of common schools, but a system thorough and efficient throughout the state.

1 “A thorough system could not mean one in which part or any number of
2 the school districts of the state were starved for funds. An efficient system
3 could not mean one in which part or any number of the school districts of the
4 state lacked teachers, buildings, or equipment.

5 “In the attainment of the purpose of establishing an efficient and
6 thorough system of schools throughout the state it was easily conceivable that
7 the greatest expense might arise in the poorest districts; that portions of great
8 cities, teeming with life, would be able to contribute relatively little in taxes for
9 the support of schools, which are the main hope for enlightening these districts,
10 while districts underpopulated with children might represent such taxation
11 value that their school needs would be relatively oversupplied.” (Emphasis
12 *sic.*)

13 The trial court’s findings of fact document that the appellant school
14 districts and other districts throughout this state are starved for funds. The
15 court’s findings document that the appellant districts and others lack
16 appropriate books. Some districts, including the appellant school districts, lack

1 appropriate buildings. This cannot be denied, given the state of the record and
2 the identified \$10.2 billion in facilities needs. The record documents that many
3 school districts lack experienced and qualified teachers. Thus, applying the
4 test of *Miller*, it is obvious that the General Assembly has failed in its
5 constitutional obligation to ensure a thorough and efficient system of common
6 schools.

7 The debates from the 1850-1851 Constitutional Convention clearly
8 indicate that the word “thorough” in Section 2, Article VI of the Ohio
9 Constitution was intended to mean a system of education that is full, absolute,
10 complete, and nearly perfect. See discussion in Part III, *supra*. The debates
11 make clear that the word “efficient” was intended to mean useful, effective, and
12 working well. *Id.* A review of the record demonstrates that Ohio’s system of
13 public elementary and secondary education is, to a degree, neither thorough nor
14 efficient. In its memorandum decision in this case, the trial court stated:

15 “This Court heard thirty days of testimony as the only individual in the
16 State of Ohio to be present for the entire proceedings. Attorneys, bailiffs, court

1 reporters and members of the gallery were either replaced or were absent from
2 some sessions. Throughout this case this Court heard from school children,
3 teachers, principals, superintendents, school board members, legislators and
4 other state personnel. The sincerity and conviction to educate from both the
5 Plaintiff and Defense witnesses [were] evident. This Court saw grown men and
6 women cry as they explained the conditions and situations in which some of
7 the youth of this State are educated. They deserve better and the State as their
8 bridge builders to the future [is] duty bound to provide them with better tools
9 for a successful life. The law requires the same. Some students in the Plaintiff
10 school districts lack equipment, supplies, textbooks, technology, [and] proper
11 handicap access and many of our special education students are not receiving
12 an appropriate public education.

13 “In the *Walter* case the Supreme Court of Ohio relied upon the State’s
14 assurances that education was thorough and efficient in part based upon the
15 minimum standards being met. Today the new minimum standards are not
16 even being monitored and haven’t been for several years. The new standard for

1 review is the ninth grade proficiency test. At trial time 32 of 99 Seniors from
2 Plaintiff Dawson-Bryant had not passed; 16 of 79 Seniors at Plaintiff Southern
3 Local; 13 or [sic, of] 154 at Plaintiff Northern Local; 300 of 773 at Plaintiff
4 Youngstown City Schools and 27% of Lima Seniors had not passed. Can a
5 system that has nearly 17,000 Seniors who have not as yet passed the ninth
6 grade proficiency test consider itself thorough and efficient? The same
7 question can be asked of a system whose equality of funding ranks it the third
8 worst in the country behind Missouri (declared unconstitutional) and Alaska. *

9 * *

10 “Some of our students are being educated in former coal bins in Mt.
11 Gilead. In Flushing the students have no restroom in the school building itself.
12 In Brown County the only library is an abandoned library truck; the band
13 practices in the kitchen and plays in the cafeteria during lunch. In Nelsonville
14 the building is slipping down a hill. At Plaintiff Northern Local children are
15 educated in modular units situated outside the school with no running water.
16 At Plaintiff Southern Local students recently completed their entire school

1 careers in buildings that for the most part were determined to be improper
2 housing in 1981. * * *”

3 There is no question that Ohio’s system of school funding violates the
4 Thorough and Efficient Clause of the Ohio Constitution. The same could be
5 said with respect to the provisions of Section 7, Article I of the Ohio
6 Constitution that mandate that the General Assembly pass *suitable laws* to
7 encourage schools and the means of instruction. “Suitable laws” cannot mean
8 laws which, by their own operation or in conjunction with other laws, deprive
9 Ohio’s school children of the high quality educational opportunities to which
10 they are entitled.

11 VI

12 Equal Protection

13 Contrary to the conclusion reached by the court of appeals, *Walter*, 58
14 Ohio St.2d 368, 12 O.O.3d 327, 390 N.E.2d 813, did *not* determine the
15 question whether education in Ohio is a fundamental constitutional right. That
16 question was not directly presented to the *Walter* court. Rather, *Walter* dealt

1 only peripherally with the question of the fundamental right of education when
2 it rejected the fundamental-right analysis of *Rodriguez*, 411 U.S. 1, 93 S.Ct.
3 1278, 36 L.Ed.2d 16. See discussion in Part IV, *supra*. Today, this court is
4 specifically called upon to determine whether education in Ohio is a
5 fundamental constitutional right. The trial court held, and I agree, that it is.

6 Since *Walter* was decided, this court has repeatedly applied a test for
7 determining fundamental rights consistent with the *Rodriguez* test, *i.e.*, whether
8 the right at issue is explicitly or implicitly guaranteed by the state or federal
9 Constitution. For example, this court recently held, in *Cleveland v. Arnold*
10 (1993), 67 Ohio St.3d 35, 44, 616 N.E.2d 163, 170, that “[f]undamental rights
11 (personal liberties) are those rights which are explicitly or implicitly embraced
12 by our Constitution and the federal Constitution. Our goal should be to
13 preserve the existence of these sacred rights.” (Footnote omitted.) Clearly, the
14 right to a free public education in Ohio has always been considered a right of
15 the people and a duty of government. The Ohio Constitution explicitly so
16 provides in its various provisions addressing the subject of education.

1 Moreover, the right to a free elementary and secondary public school education
2 is implicit in the concept of ordered liberty. The framers of the 1850-1851
3 Ohio Constitution clearly acknowledged that education is the foundation upon
4 which all other individual liberties are based. Their debates can lead to no
5 other conclusion than that education is a fundamental right guaranteed to all of
6 Ohio's school-age children. Further, the Land Ordinance of 1785 and
7 Northwest Territory Ordinance of 1787 embodied the grand ideal that
8 education was to be the cornerstone of the vast and orderly migration
9 westward. Indeed, education is the institution upon which this great nation was
10 built.

11 Accordingly, I would hold that education in Ohio is a fundamental
12 constitutional right guaranteed by the Ohio Constitution. As Judge Gwin so
13 ably noted in his concurring and dissenting opinion in the court of appeals, "I
14 believe that education is a fundamental right. More than one-third of the entire
15 state budget is devoted to education. An entire Article of our State
16 Constitution addresses public education, and it mandates that schools be

1 adequately funded so that our schools are thorough and efficient. Finally,
2 common sense dictates that nothing is more important to Ohio's children than
3 to make them competitive and fulfilled personally. To hold otherwise is to
4 bury our heads in the sand."

5 Because education is a fundamental right, the school funding legislation
6 is subject to a strict scrutiny standard of review for purposes of determining
7 whether the legislation violates the Equal Protection Clause of Section 2,
8 Article I of the Ohio Constitution. Appellees have taken the position that local
9 control justifies the large wealth-based disparities created by Ohio's system of
10 school funding. I disagree. Rather, I agree *in toto* with the trial court's
11 observations:

12 "Local control in many of this State's school districts and specifically in
13 the Plaintiff school districts is a cruel illusion. Plaintiff Northern Local School
14 District has primarily engaged in 'crisis management' during the 1990's and
15 has been forced to forgo building repairs, textbook renewal, advanced
16 placement options and full handicapped access. Plaintiff Lima City Schools

1 has spent over \$10 million dollars since 1980 to comply with unfunded state
2 mandates and has been unable to purchase necessary educational equipment
3 and supplies, expand elementary guidance services or offer all-day every-day
4 kindergarten. Plaintiff Dawson-Bryant School District has been unable to
5 implement advanced placement courses, all-day every-day kindergarten,
6 textbook replacement and full handicapped access to its building. Plaintiff
7 Southern Local School District is simply reacting to state mandated regulations
8 and deciding what programs and services to cut. * * * Plaintiff Youngstown
9 City School District no longer makes proactive decisions about what programs
10 to add and policies to implement based upon the best interest of the students.
11 Instead, * * * the board[']s decisions mainly regard the cutting of programs.

12 “It can be argued that the local school districts possess control of local
13 education through the ability to raise their level of funding through tax
14 increases. Due to the Plaintiff school districts being some of the poorest in the
15 State this is not a viable option. The fact that school districts have the ‘ability’
16 to determine how dollars are spent in some circumstances is a hollow argument

1 when there are not sufficient funds to provide for the educational and facility
2 needs of their particular school district. * * *

3 “* * * As the Plaintiffs have argued in this case local control without
4 discretionary funds is a myth and does not justify the vast disparities in
5 educational funding and educational opportunity throughout this State. There
6 is only one system of education in this State and that is a state system. The
7 local control currently realized by the Plaintiff school districts is not sufficient
8 justification for the discriminatory educational opportunities afforded to the
9 students of this State.”

10 The concept of local control is a myth for the appellant school districts
11 and others. The notion of local control is a particularly cruel illusion for school
12 districts that have been subjected to state supervision under the provisions of
13 R.C. 3313.48 *et seq.* Finally, on the issue of local control, if local control is
14 really an issue, why have over five hundred fifty of the state’s six hundred
15 eleven school districts joined together as a coalition to support this case? Just
16 asking the question would seem to answer the “local control” contention.

1 dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with
2 whom he deals in his official capacity * * *.” (Emphasis added.) He makes
3 me, once again, proud to be a judge.

4 VIII

5 The Remedy

6 In his Inaugural Address delivered on Monday, January 20, 1997,
7 President William J. Clinton discussed his vision for “a land of new promise.”
8 He said that:

9 “In this new land, education will be every citizen’s most prized
10 possession. Our schools will have the highest standards in the world, igniting
11 the spark of possibility in the eyes of every girl and every boy. And the doors
12 of higher education will be open to all. The knowledge and power of the
13 Information Age will be within reach not just of the few, but of every
14 classroom * * *.”

15 In his State of the State Address delivered on January 14, 1997, the
16 Governor of Ohio, in discussing the difficult choices that have to be made for

1 the funding of competing worthwhile programs, said that he wanted “to focus
2 on the one choice on which I know we can all agree -- the need to build on the
3 foundation we have laid to make Ohio’s schools *second to none, now and in*
4 *the 21st century.*” (Emphasis added.) “Perhaps,” said the Governor, “the most
5 significant thing we have done since 1991 is to reinforce the idea that
6 education is everybody’s business -- *and that education improvement is our*
7 *state’s number one priority.*” (Emphasis added.) The Honorable Governor
8 also noted that “in a recent national survey, 10 of our 13 public universities
9 were ranked among the best in the nation.”

10 In his State of the Union Address on Tuesday, February 4, 1997, in
11 discussing the future of education in America and educational funding, the
12 President said:

13 “One of the greatest sources of our strength throughout the Cold War
14 was a bipartisan foreign policy. Because our future was at stake, politics
15 stopped at the water’s edge. Now I ask you, and I ask all our nation’s
16 governors, I ask parents, teachers and citizens all across America, for a new

1 nonpartisan commitment to education, because education is a critical national
2 security issue for our future and politics must stop at the schoolhouse door.”

3 By our decision today, a majority of this court facilitates these admirable
4 goals. The remedy need not and should not be one which takes from the rich to
5 give to the poor. School districts that want to do even more for their school
6 children than the bare minimum should not be penalized. Likewise, higher
7 education in Ohio should not be required to make even further sacrifices to
8 meet the obvious current shortfall in primary and secondary educational
9 funding. Higher education institutions cannot be the “Red Cross” for primary
10 and secondary public education. For the job they are obviously doing their
11 performance should be rewarded -- not penalized. Thus, the remedy and
12 solution must lie in other initiatives.³ We can do better than our ranking of
13 forty-eighth out of the fifty states in the extent of disparity of revenue and
14 expenditure per pupil.

15 Many of our public schools are in deplorable condition. This is a
16 documented \$10 billion problem. In addition, too many schools are without

1 proper teaching facilities -- labs, up-to-date textbooks, supplies and adequately
2 compensated teachers. By our decision today we require the General Assembly
3 to act with all deliberate speed to establish a constitutional system of school
4 funding to address the formidable problems facing many of Ohio's school
5 districts.

6 Some might choose to ignore our decision. That would be unfortunate --
7 not necessarily for us or them but for the school children of Ohio who depend
8 upon all of us to give them, by way of educational opportunity, that which we
9 ourselves were afforded. Accordingly, to ensure compliance with our decision,
10 I am in complete agreement with the determination to remand this cause to the
11 trial court with plenary authority to enforce our decision.

12 IX

13 Costs and Attorney Fees

14 The trial court awarded costs and attorney fees in favor of appellants. I
15 agree with the majority's determination reinstating the award of attorney fees.
16 The majority opinion does not discuss the award of costs but, by reversing the

1 judgment of the court of appeals, this court has essentially reinstated the award
2 of costs to appellants -- the parties who prevailed at trial.

3 X

4 Conclusion

5 I join today's majority opinion without hesitation or reservation. Ohio's
6 statutory scheme for funding public elementary and secondary education is
7 unconstitutional. A review of the record and the governing law can support no
8 other conclusion.

9 RESNICK, J., concurs in the foregoing concurring opinion.

1 *FOOTNOTES:*

2 ¹ An outstanding example of this is the state of Kentucky, as so clearly
3 chronicled in a series of recent articles in both the *Canton Repository* and the
4 *Akron Beacon Journal*.

5 ² It is interesting to note that a news article in the *Athens News* of
6 Wednesday, November 27, 1996, entitled “State Auditor: School equity, an
7 idea whose time has come” stated that:

8 “An equity lawsuit filed on behalf of the Perry County schools — and a
9 statewide coalition of public schools — is currently being considered by the
10 Ohio Supreme Court, whose decision could pave the way for a major change in
11 education funding.

12 “Petro said he believes the Supreme Court will overturn an earlier
13 appellate court decision in the case, and will rule that Ohio’s school funding
14 method violates the state constitution.

15 ““And frankly, I think it’s time to do that,’ he added.”

1 The auditor, a former member of the General Assembly, is faced in his
2 official capacity with having to frequently deal with financially struggling
3 school districts. I find his candor refreshing.

4 ³ It should not go unnoticed or unmentioned that Governor Voinovich and
5 the General Assembly have joined, under the Governor's leadership, to make
6 Ohio the leading state in "Head Start" education. This humane initiative has
7 reaped and will continue to reap tremendous dividends for our children and our
8 state.

9 It also has not gone unnoticed that the General Assembly has provided,
10 in recent budgets, some additional funding for education and that even more is
11 recommended in the current proposed state budget for the next biennium.
12 These initiatives are laudable and the Governor and General Assembly should
13 be commended for their efforts. The difficulty is that given the enormity of the
14 problem, the current fiscal constraints and the convoluted scheme for funding
15 education now on the law books of Ohio, such actions just cannot and will not
16 get the job done.